

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7049

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANITA B. BRODY,

Plaintiff-Appellant,

—against—

CHEMICAL BANK, MANUFACTURERS HANOVER TRUST COMPANY,
IRVING TRUST COMPANY, CHASE MANHATTAN BANK, N.A.,
BANK OF MONTREAL, GIRARD TRUST BANK AND THE FIDELITY BANK,

Defendants-Appellees,

—and—

PENNSYLVANIA COMPANY,

Defendant.

(ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK)

APPENDIX

MILBANK, TWEED, HADLEY
& McCLOY

Attorneys for

Defendants-Respondents

Chase Manhattan Bank, N.A.

and Girard Trust Bank

One Chase Manhattan Plaza

New York, New York 10005

422-2660

BRADY, TARPEY, DOWNEY,
HOEY, P.C.

Attorneys for

Defendant-Respondent

Bank of Montreal

84 William Street

New York, New York 10038

WINTHROP, STIMSON,
PUTNAM & ROBERTS

Attorneys for

Defendant-Respondent

Irving Trust Company

40 Wall Street

New York, New York 10005

943-0700

WOLF POPPER ROSS WOLF & JONES

Attorneys for Plaintiff-Appellant

845 Third Avenue

New York, New York 10022

PL 9-4600

CRAVATH, SWAINE & MOORE

Attorneys for Defendants-Respondents

Chemical Bank and The Fidelity Bank

One Chase Manhattan Plaza

New York, New York 10005

422-3000

SIMPSON THACHER & BARTLETT

Attorneys for Defendant-Respondent

Manufacturers Hanover Trust Company

One Battery Park Plaza

New York, New York 10004

483-9000

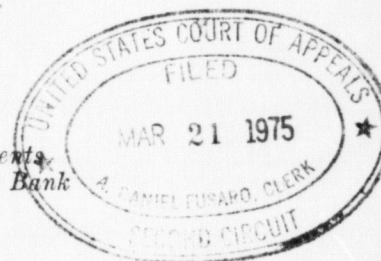
WACHTELL, LIPTON, ROSEN & KATZ

Attorneys for Defendant

Pennsylvania Company

230 Park Avenue

New York, New York 10017



PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	Page
Docket Entries	1a
Verified Amended Complaint	6a
Affidavit of Benedict Wolf, In Opposition to Motion to Dismiss Amended Complaint.	28a
Exhibit A - Amended Complaint in Philadelphia Common Pleas Court.	31a
Exhibit B - Preliminary Objections Of Pennsylvania Company.	51a
Exhibit C - Memorandum of Pennsylvania Company in Support of Preliminary Objections.	56a
Exhibit D - Memorandum on Banks in Penn Central Reorganization Proceedings.	67a
Affidavit of Benedict Wolf, In Opposition to Motion to Dismiss Amended Complaint.	76a
Letter of Benedict Wolf to Judge Gagliardi	85a
Affidavit of Paul M. Ostergard	90a
Verified Second Amended Complaint.	93a
Notice of Motion To Dismiss Second Amended Complaint	107a
Memorandum Decision and Order Dismissing Second Amended Complaint.	109a
Order	114a
Notice of Appeal from Order of December 9, 1974.	115a
Notice, Proposed Order and Judgment, Affidavit of Robert M. Sondak.	117a
Order and Judgment Dismissing Action With Prejudice	123a
Notice of Appeal from Order and Judgment Dismissing Action With Prejudice	125a

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CIVIL DOCKET

UNITED STATES DISTRICT COURT

1a
Jury demand date:

71 CIV 2639

D. C. Form No. 106 Rev.

by Pltff. 6-14-71

TITLE OF CASE	ATTORNEYS
ANITA B. BRODY	For plaintiff:
AGAINST,	WOLF, POPPER ROSS WOLF & JONES,
CHEMICAL BANK	845 Third Avenue,
MANUFACTURERS HANOVER TRUST COMPANY,	N.Y., N.Y. 10022
IRVING TRUST COMPANY,	
CHASE MANHATTAN BANK, N.A.	
BANK OF MONTREAL,	
GIRARD TRUST BANK,	
THE FIDELITY BANK,	
MELLON NATIONAL BANK & TRUST COMPANY, 1/28/74 AMENDED	
PITTSBURGH NATIONAL BANK,	
NATIONAL BOULEVARD BANK OF CHICAGO, AND	
PENNSYLVANIA COMPANY,	
	For defendant:
	WACHTELL, LIPTON, ROSE & KATZ
	230 Park Ave., NYC 10017
	deft. Pennsylvania Co.
	2/7/73 Changed to
	299 Park Ave.
	NY Tel. 371-9200.

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk	6-14-71	WOLF PAR	15	
J.S. 6 mailed	Marshal	6-15-71	US FEES		15
		8/21/72	WOLF, P	5	
		8/22/72	US TRAV		5
Basis of Action:	Docket fee				
VIOL. S.E.C. ACT. 1933	Witness fees				
Action arose at:	Depositions				

2a

DATE	PROCEEDINGS	Date Order or Judgment Made
Jun 14-71	Filed Complaint. Issued Summons.	
Jun 17-71	Filed Notice of Assignment. J. Pollack	
Aug. 2-71	Filed plttf's Verified Amended Complaint. Plttf! Demands A Trial By Jury	
Aug. 9-71	Filed stipulation and order extending deft. Pennsylvania Co.'s time to answer complaint to 9/8/71, etc. etc. So ordered. Pollack, J.	
Aug. 9-71	Filed stipulation and order extending certain defendants time to answer complaint to 9/8/71, etc. etc. So ordered. Pollack, J.	
Aug. 18-71	Filed Summons with Marshal's ret. Served: Charles Lee, Unable to serve on 7-1-71	
Aug. 18-71	Filed summons with marshal's ret. Served: Pennsylvania Co. NOT SERVED. National Blvd. Bank of Chicago by Mrs. Jean Anderson on 6/22/71 Pittsburgh National Bank by Mr. Scott W. Mitchell on 6/21/71. Mellon National Bank Trust Co. by Mr. Jones on 6/17/71. Fidelity Bank by Albert R. Kaufmann on 6/16/71. Girard Trust Bank by Mrs. Scarlett Peterson on 6/16/71. Bank of Montreal by John Christensen on 6/17/71. Chase Manhattan Bank N.A. by James P. Power on 6/15/71. Irving Trust Co. by Mr. Goodwin on 6/17/71. Manufacturers Hanover Trust Co. by Stanley A. Samuels on 6/16/71. Chemical Bank by Wm. A. Smith on 6/15/71.	
Aug. 19-71	Filed stipulation and order substituting Skadden, Arps, Slate, Meagher & Flom as attorneys for deft. Pittsburgh National Bank, in place and stead of Cravath, Swaine & Moore, So ordered. Pollack, J.	
Aug. 19-71	Filed stipulation and order substituting Skadden, Arps, Slate, Meagher & Flom as attorneys for defts. Mellon National Bank & Trust Co. and National Boulevard Bank of Chicago, in place and stead of Debevoise, Plimpton, Lyons & Gates. So ordered. Pollack, J.	
Sep. 2-71	Filed stip and order that the time for defts' Chemical Bank, The Fidelity Bank, and Manufacturers Hanover Trust Co., to answer is ext. to 9-22-71., etc. So Ordered: Pollack, J.	
Sep. 8-71	Filed stip and order that the time of deft. Pennsylvania Co. to answer complaint is ext. to 9-17-71. So Ordered: Pollack, J.	
Sep. 9-71	Filed defts' Mellon National Bank & Trust Co., Pittsburgh National Bank and National Boulevard Bank of Chicago, affdvt. and notice of motion to dismiss action. Before; Pollack, J. in Rm. 705 on 9-17-71.	
Sep. 9-71	Filed defts. Brief in support of motions	
Sep. 17-71	Filed stip and order that the motion of defts' Mellon National Bank & Trust Co., Pittsburgh National Bank and National Boulevard Bank of Chicago, to dismiss action as to said defts. ret. 9-17-71 is adjourned to 10-8-71, and unless the said defts' shall answer within ten (10) days after entry of the order disposing of said motion. So Ordered; Pollack, J.	
Sep. 21-71	Filed stip. and order that the time for defts' to answer is ext. to 10-13-71, and that plttf's time to move for a determination as to whether the action is to be maintained as a class action is ext. to 11-12-71. So Ordered; Pollack, J.	
Sep. 21-71	Filed Summons with Marshal's ret. Served; Pennsylvania Co., by Howard K. Webb on 7-23-71 (Additional Summons)	
Sep. 22-71	Filed stip and order that the time for deft. Pennsylvania Co. to answer amended complaint is ext. to 10-13-71 and the time for plttf. as to whether the action is to be maintained as a class action, is ext. to 11-12-71. So Ordered; Pollack, J.	

Port of N. H. 1-1-71

JUDGE GAGLIARDI

3a

JUDGE POLLACK

Page 3

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order Judgment
Oct. 4-71	Filed stip and order that the motion of defts' Mellon National Bank & Trust Co., Pittsburgh National Bank and National Boulevard Bank of Chicago for an order dismissing this action, is ext. from 10-8-71 to 10-22-71, etc. So Ordered; Pollack, J.	
Oct. 12-71	Filed stip and order that the time for defts' to answer is ext. to 10-27-71, and plttf's time to move for a determination as to whether the action is to be maintained as a class action is ext. to 12-3-71. Pollack, J.	
Oct. 20-71	Filed stip and order that the motion of defts' Mellon National Bank & Trust Co. Pittsburgh Bank and National Blvd. Bank of Chicago, for order dismissing this action be, ext. from 10-22-71 to 11-5-71, etc. Pollack, J.	
Nov. 1-71	Filed stip and order that the time for defts' to answer is ext. to 11-5-71, etc. Pollack, J.	
Nov. 4-71	Filed Edward K. Aldworth, affdvt. for deft. National Blvd. Bank of Chicago, in support of motion to dismiss.	
Nov. 4-71	Filed Affdvt. of Edwin H. Yeo, for defts' Mellon National Bank and Trust Co. Pittsburgh National Bank and the National Blvd. Bank of Chicago, in support of motion to dismiss.	
Nov. 4-71	Filed Affdvt. of William J. Wallace, for defts' Mellon National National Bank & Trust Co. Pittsburgh National Bank and National Blvd. Bank of Chicago, in support of motion to dismiss.	
Nov. 4-71	Filed defts' Mellon National Bank and Trust Co., Pittsburgh National Bank and the National Blvd. Bank of Chicago, Memorandum in support of motion to dismiss.	
Nov. 4-71	Filed stip and order that the time for deft. Pennsylvania Co. to answer amended complaint is ext. to 11-5-71, etc. Pollack, J.	
Nov. 8-71	Filed defts' Chemical Bank and The Fidelity Bank, Affdvts' and notice of motion to dismiss complaint. Ret. 11-19-71, Rm. 619, Before, Pollack, J.	
Nov. 8-71	Filed Moving Defts' Memorandum in Support of motion to dismiss complaint.	
Nov. 9-71	Filed ANSWER to Amended Complaint by deft. Pennsylvania Co.	WLR
Nov. 15-71	Filed Affdvt. of Benedict Wolf, for plttf. in opposition to motion to dismiss.	
Nov. 15-71	Filed MEMO. END. on motion papers filed 9/9/71. Motion granted, etc. So ordered. Pollack, J.	
Nov. 18-71	Filed copy of order (Memo. End.) filed 11/15/71 with notice of entry.	
Nov. 19-71	Filed stip and order that the plttf's time to move for a determination for class action determination, is ext. to 3-13-71. Pollack, J.	
Nov. 29-71	Filed stipulation and order adjourning motion now ret. 11/19/71 to 12/17/71 at 2:15 P.M. at Room 619 U.S. Courthouse. So ordered. Pollack, J.	
Dec. 7-71	Filed stip and order that the motion of defts' Chemical Bank and The Fidelity Bank, to dismiss action is ext. from 12-17-71 to 1-21-72. Pollack, J.	
Jan. 6/72	Filed Stip. and Order adjourning Motion now ret. 1/21/72 to 2/11/72. So Ordered Pollack J.	
Mar. 3.72	Filed Stip & Orders discontinuing counts 2 & 4 of the amended complaint without prejudice, etc. So Ordered Pollack J.	
Mar. 7-72	Filed Order that this action is hereby reassigned and transferred to the Master Calendar, and the pending motion is referred to the Motion Calendar Room 506, for argument on 3/26/72 at 10 A.M.; the additional papers of the parties should be filed at the Motion Clerk's Office, Room 611-A, by noon 3/22/72. So ordered. Edelstein, Ch. J.	

continued next page

DATE	PROCEEDINGS	Date Order's Judgment No.
Mar 20-72	Filed Stip & Order extending time to answer to 9/13/72. So Ordered Metzner J.	
Mar.22-72	Filed Affidavit of Benedict Wolf.	
Mar.22-72	Filed Plaintiff's Reply Memorandum in opposition to motion to dismiss.	
Mar.22-72	Filed Plaintiff's Supplemental Memorandum of Law in opposition to motion to dismiss.	
Mar.22-72	Filed Affidavit of Richard M. Sharfman.	
Mar.22-72	Filed Memorandum in reply to pltf's Supplemental papers.	
Jul.26-72	Filed Paul M. Ostergard, Affdvt. for deft. Pennsylvania Co.	
Jul.26-72	Filed reply Memorandum of moving defts' on motion to dismiss complaint	
Jul.26-72	Filed pltf's Memorandum in opposition to motion to dismiss complaint	
Jul.26-72	Filed Opinion # 38700. In accordance with the reasons set forth above, the defendants' motion to dismiss the complaint is granted. So ordered. Gagliardi, J. JUDGMENT ENT. 8/3/72. M/N	
Aug 21-72	Filed pltf's notice of appeal from final judgment entered 8-3-72-Mailed copies	
Aug 21-72	Filed Undertaking for Cost on appeal - \$250 - Aetna Casualty & Surety Co.	
Mar 28-72	Filed in Court affdvt of Benedict Wolf (for pltf) in opposition to motion to dismiss	
Sep 8-72	Filed pltf's memorandum of law in opposition to motion to dismiss (Rec'd in Chambers 10-27-71)	
Sep 22-72	Filed Letter of Benedict Wolf to Gagliardi, J. dated 7-11-72	
Sep.28-72	Filed Certified Record on Appeal to the U.S.C.A.	
Feb.7-73	Filed notice of change of address of Wachtell, Lipton, Rosen & Katz, attys. for deft. Pennsylvania Co., to 299 Park Ave. NY 10017 Tel.371-9200.	
pr.18-73	Filed Agreement of merger by Chemical Bank.	
pr.20-73	Filed notice that supplemental record on appeal has been certified & transmitted to the U.S. Court of appeals.	
Aug.16-73	Filed true copy from USCA, 2nd Circuit that order and judgment are affirmed in part and action is remanded to said District Court for further proceedings in accordance with opinion of this court. Clk (mn)	
April-74	Filed verified second amended complaint.	
Jan22-74	Filed ORDER that the defts' time to answer the second amended complaint is ext. to 2-13-74. Gagliardi, J. mn	
Jan28-74	Filed Stip & Order that the caption is amended, as indicated. Gagliardi, J.	
Mar5/74	Filed Stip & Order that the defts' motion for judgment, etc.] is adj'd to 3/26/74. Gagliardi, J.	
Mar 19/74	Filed Stip & Order that defts' motion for judgment pursuant to 12(b)(6) is adj to 4/9/74. Gagliardi, J.	
pr 2/74	Filed pltf's memorandum in opposition to deft Banks' motion to dismiss the second amended complaint.	
pr 8/74	Filed Bank Defts' reply memo in support of motion to dismiss the 2nd Amended complaint.	
pr 17/74	Filed ORDER that the time for all defts to answer is ext to and including 15 days after the entry of an order finally determining the motion of the bank defts in this case brought on by notice of motion dtd 2/8/74, to dismiss, etc. Gagliardi, J. mn	
ec.9/74	Filed OPINION # 41539- ...Because pltf's amended allegations relate to the Pennco board as constituted at the time of the commencement of the action, they are clearly insufficient to satisfy the requirements of Rule 23.1 in this case. The defts' motion to dismiss the second amended complaint is therefore granted. However, pltf. is given 20 days within which to either make a demand on the directors or replead. Gagliardi, J. mailed notices.	
ec.26/74	Filed ORDER that the time for pltf to make a demand on the directors of Pennco. Co. or replead is ext. to 1/9/75. Gagliardi, J. mn	

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71 Civil 2639 Judge Gagliardi Page 5

Anita Brody -vs- Chemical Bank, et al.

5a

D. C. 110A Rev. Civil Docket Continuation

DATE	PROCEEDINGS
Jan. 6/75	Filed plttf.'s notice of appeal from order of 12/9/74. mailed copies.
02-10-75	Filed ORDER AND JUDGMENT. Action dismissed with prejudice. Gagliardi, J. (mn) 6/8/75
02-18-75	JUDGMENT ENTERED. Clk. (ENT. 2/1/75
02-18-75	Filed Notice that record on appeal has been certified and transmitted to USCA
02-18-75	Filed appellant Anita Brody's cost bond in the sum of \$250.00 (Aetna Life and Casualty).
02-28/75	Filed Plttf's Notice of Appeal from each and every part of order 7 judgment of 2/10/75, dismissing 2nd amended complaint. (mailed notice to E. Cravath, Swaine & Moore, Simpson, Thacher & Bartlett, Winthrop, Stimson, Putnam, & Roberts; Milbank, Tweed, Hadley & McCloy; Brady, Tarpey, Downey, Hoey, P.C.; Wachtell, Lipton, Rosen & Katz on 3/4/75)

A TRUE COPY

RAYMOND F. BURGESS, Clerk

By

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANITA B. BRODY,

Plaintiff,

71 Civ. 2639- M.P.

-against-

CHEMICAL BANK, MANUFACTURERS HANOVER
TRUST COMPANY, IRVING TRUST COMPANY,
CHASE MANHATTAN BANK, N.A., BANK OF
MONTREAL, GIRARD TRUST BANK, THE
FIDELITY BANK, MELLON NATIONAL BANK
& TRUST COMPANY, PITTSBURGH NATIONAL
BANK, NATIONAL BOULEVARD BANK OF
CHICAGO and PENNSYLVANIA COMPANY,

VERIFIED AMENDED
COMPLAINT-DERIVATIVE
AND CLASS ACTION

PLAINTIFF DEMANDS
A TRIAL BY JURY

Defendants.

Plaintiff, by her attorneys, WOLF POPPER ROSS WOLF
& JONES, for her complaint, alleges on information and belief
except as to paragraphs "1", "2", "3" "6", "37" and "40" which
plaintiff alleges upon knowledge:

FIRST COUNT AGAINST ALL
DEFENDANTS

1. Plaintiff is the owner and holder of shares
of the cumulative preferred stock of the defendant Pennsylvania
Company ("Pennco"). Plaintiff has been a stockholder of Pennco
since May 14, 1968 and was a stockholder of Pennco at the time
of the acts and transactions complained of herein.

2. Plaintiff brings this cause of action deriva-
tively on behalf of, and for the benefit of, Pennco.

3. This action is not a collusive one to confer
on this court jurisdiction it would otherwise not have.

4. This count is brought to enforce rights arising
under Section 17(a) of the Securities Act of 1933 ("Securities

Actⁿ), 15 U.S.C. Section 77q(a) and the common law. This Court has jurisdiction of this count under Section 22(a) of the Securities Act, 15 U.S.C. Section 77v(a) and under the principle of pendent jurisdiction.

5. This count arises from sales of securities and acts and transactions which occurred in the Southern District of New York.

6. Plaintiff is a citizen of the State of Pennsylvania.

7. Pennco was, at all times hereinafter mentioned, and still is: (a) a corporation organized under the laws of the State of Delaware; and (b) present and doing business in the City, County and State of New York with offices for the transaction of business in the Borough of Manhattan. At all such times, Pennco transacted, and still transacts, business in the City, County and State of New York. Pennco's Board of Directors has met in the City, County and State of New York and Pennco maintains at least one bank account in the City, County and State of New York.

8. Pennco operates as an investment company. Its principal investments include holdings in railroad companies, controlling interests in real estate development companies, and all of the common stock of a pipeline company. At the end of 1969, 95.3% of its assets consisted of stocks and bonds and other evidences of indebtedness.

9. The defendants (the "Defendant Banks") are all banking institutions which, at all times hereinafter mentioned, and at the present time, had and have citizenship and residence as follows:

- (a) Chemical Bank ("Chemical"), Manufacturers Hanover Trust Company ("Manufacturers") and Irving Trust Company ("Irving") are organized under the laws of the State of New York and are present and doing business in the City and County of New York with offices for the transaction of business in the Borough of Manhattan.
- (b) Chase Manhattan Bank, N.A. ("Chase") is organized under the laws of the United States and maintains its principal place of business in the City, County and State of New York.
- (c) Bank of Montreal ("Montreal") is organized under the laws of the Country of Canada and is present and doing business in the City, County and State of New York with offices for the transaction of business in the Borough of Manhattan.
- (d) Mellon National Bank and Trust Company ("Mellon") and Pittsburgh National Bank ("PNB") are organized under the laws of the United States and are present and doing business in the City, County and State of New York with offices for the transaction of business in the Borough of Manhattan.

(e) National Boulevard Bank of Chicago ("Boulevard") is organized under the laws of the United States with principal offices in Chicago, Illinois.

(f) Girard Trust Bank ("Girard") and The Fidelity Bank ("Fidelity") are organized under the laws of the State of Pennsylvania with principal offices in Philadelphia, Pennsylvania.

10. Penn Central Transportation Company ("Railroad") was at all times hereinafter mentioned, and still is: (a) a corporation organized under the laws of the Commonwealth of Pennsylvania; and (b) present and doing business in the City, County and State of New York with offices for the transaction of business located in the Borough of Manhattan.

11. A. At all times hereinafter mentioned, and at the present time, defendants Montreal, Mellon, PNB, Boulevard, Girard and Fidelity transacted and still transact business in the City, County and State of New York.

B. At all times hereinafter mentioned, and at the present time, said defendants derived and presently derive substantial revenue from interstate commerce.

C. The causes of action set forth herein arise (a) out of the business transacted by said defendants in the City, County and State of New York; (b) out of tortious acts committed by said defendants in the City, County and State of New York; and (c) out of tortious acts committed by said defendants without the State of New York causing injury to persons and property within the State, which injury said defendants expected or should reasonably have expected.

12. Pennco's capital stock consists of 5,600,000 shares of common stock, of which 4,985,000 shares are issued and outstanding, and 730,000 shares of 4-5/8% cumulative preferred stock, \$100 par value, of which 705,786 shares are outstanding. The preferred stock can exercise voting rights if dividends are defaulted for six quarterly periods, in which event the preferred stockholders can elect two directors. Dividends on the preferred stock are paid from the Defendant Chemical in the City, County and State of New York.

13. All of Pennco's common stock is owned by Railroad. Its cumulative preferred stock is publicly owned.

14. Railroad, through such stock ownership, at all times hereinafter mentioned, has controlled and continues to control Pennco and Railroad has selected and designated the directors and officers of Pennco.

15. In the foregoing manner, Railroad was able to and did completely control and dominate the management of the affairs and business of Pennco, and Pennco's business decisions and policies were determined by Railroad.

16. Railroad has been in a precarious financial condition for more than a year and a half. It had a loss of more than \$56 million in 1969, and a loss of \$62.7 million in the first quarter of 1970. On a consolidated basis, the loss for the first quarter of 1970 was \$79.6 million. It had a serious problem of liquidity which compelled it, on June 20, 1970, to file a petition under Section 77 of the Federal Bankruptcy Act. The Defendant Banks have been aware, since its organization, of Railroad's precarious position.

17. At least one of the Defendant Banks, Defendant Chase, on behalf of its customers, was heavily invested in the common stock of Penn Central Company ("Penn Central"), the parent of Railroad. Thus, it was in the interest of the Defendant Chase to keep the true financial picture of Railroad from becoming publicly known for a long enough period to enable it to liquidate its holdings in Penn Central. Defendant Chase, acting upon the confidential information referred to in paragraph 19 hereof, did in fact liquidate many of its holdings prior to the filing by Railroad of the aforesaid petition under the Bankruptcy Act.

18. At all times hereinafter mentioned and continuing to the present time, Railroad has managed and operated Pennco, and has used its assets and credit, for the benefit of Railroad and to the detriment of Pennco, causing Pennco to enter into the transactions hereinafter described for Railroad's benefit in disregard of the interests of Pennco. The Defendant Banks conspired with, and aided and abetted Railroad, in said transactions, as follows:

19. Sometime in or about early 1970, Railroad disclosed its dire financial situation to the Defendant Banks, showing them confidential projections of its dismal financial future, and informing the Defendant Banks of its critical need for funds. Such information disclosed to the Defendant Banks was not yet available to the public. Railroad requested a loan from the Defendant Banks, but they refused to lend funds directly to Railroad.

[12a .

20. Accordingly, the Defendant Banks and Railroad conspired together to, and did, cause Pennco, in May or June, 1970, to borrow \$50 million from the Defendant Banks in return for the note or notes of Pennco and transfer the proceeds of said loan to Railroad in exchange for the note or notes of Railroad. This loan was not intended to and did not serve any proper business or corporate purpose of Pennco. This loan was negotiated in the City, County and State of New York and was closed in the offices of Chemical in the City, County and State of New York.

21. The forced participation of Pennco in said loan was a sham and a fraud upon Pennco. Pennco received no genuine consideration for said participation, receiving only the note or notes of Railroad, which note or notes the Defendant Banks knew or had reason to know was, or would shortly become, almost worthless. Said forced participation of Pennco impaired its capital and credit solely for the benefit of Railroad and the Defendant Banks and converted the assets of Pennco to Railroad's use.

22. The Defendant Banks were wilfull conspirators with Railroad in the aforesaid loan transaction. The Defendant Banks knew or had reason to know that:

- (a) Their loan of \$50 million to Pennco was not for any valid business or corporate purpose of Pennco and Pennco had no valid reason to borrow said sum;
- (b) At the time of said loan transaction, Railroad controlled Pennco and Pennco's directors were also directors of Railroad;

13a

- (c) Railroad was compelling Pennco to borrow said \$50 million and Railroad was the intended recipient of the loan;
- (d) Railroad's note, received by Pennco, was not fair or adequate consideration for the funds turned over by Pennco to Railroad. Railroad's note was, or would shortly become, almost worthless and Railroad was incapable of repaying the loan to Pennco.

23. By reason of the foregoing, the Defendant Banks violated Section 17(a) of the Securities Act in that, in the sales of securities by the use of the mails and other instruments of transportation or communication in interstate commerce, they employed devices, schemes and artifices to defraud; they obtained money or property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and they engaged in transactions, practices or courses of business which operated as a fraud or deceit upon Pennco.

24. By reason of the foregoing, the Defendant Banks conspired to, and did, defraud Pennco, to the substantial benefit and unjust enrichment of the Defendant Banks, causing great harm and substantial damage to Pennco in the amount of at least \$50 million.

25. The exact amount of the benefit to, and unjust enrichment of, the Defendant Banks, and the exact amount of

damages to Pennco are unknown to plaintiff and can only be ascertained upon an accounting.

26. Plaintiff has made no demand on the Board of Directors of Pennco to take action with regard to the wrongs herein described because all of said directors are designees of Railroad which, through its ownership of all of Pennco's common stock, has been able to designate and select said directors. Railroad, by said stock ownership, controls Pennco and said directors. Thus, to make demand upon said directors would be to request that they sue the company that has chosen them and that controls them. By reason of the foregoing, any demand upon said Board of Directors to redress or prevent the wrongs herein described would have been futile.

27. Demand on the stockholders of Pennco to bring this action was not made and would have been futile for the following reasons:

A. Railroad owns all of the common stock of Pennco and, through such stock ownership, controls Pennco. Thus, such a demand would have been futile because it would have been made upon Railroad, one of the persons alleged herein to be wrongdoers.

B. A demand upon Pennco's preferred stockholders to bring this action would also have been futile because:

1. Under the charter and by-laws of Pennco, the management of its affairs including the bringing of suit is entrusted to the Board of Directors and not the preferred stockholders. The preferred stockholders cannot by resolution or otherwise require Pennco or its Board of Directors to bring an action.

11. A resolution of the preferred stockholders demanding the bringing of the suit would be futile since control of the action would be in the hands of Railroad, one of the persons alleged to be wrongdoers, and the action cannot properly be prosecuted by Railroad.

111. Pennco has thousands of preferred stockholders scattered throughout the United States. A demand upon them to take action would cast an unconscionable financial burden upon the plaintiff in that the plaintiff would have to solicit proxies from all of the preferred stockholders residing throughout the country. It would involve the conduct of a proxy fight which would entail prohibitive expenses and would cause undue loss of time.

28. Plaintiff has no adequate remedy at law.

SECOND COUNT AGAINST
ALL DEFENDANTS

29. This count arises under the Interstate Commerce Act ("ICA") 49 U.S.C. Sections 1 et seq., an act of Congress regulating commerce, and is brought to enforce rights arising under Sections 8 and 20a of the ICA, 49 U.S.C. Sections 8 and 20a. This Court has jurisdiction of this count under 28 U.S.C. Section 1337 and under Section 9 of the ICA, 49 U.S.C. Section 9.

30. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "3", "5" through "22" and "25" through "28" hereof with the same force and effect as if set forth in full herein.

31. Pennco and Railroad are subject to the provisions of Chapter I of the ICA. Pennco is a carrier within the meaning of Section 20a of the ICA and Railroad is a common carrier within the meaning of Sections 8 and 9 of the ICA.

32. The notes that Pennco was caused to issue to the Defendant Banks in the transaction complained of herein constituted more than 5% of the par value of Pennco securities outstanding at the time said notes were issued.

33. Under Section 20a(2) of the ICA, said notes could not lawfully be issued and Pennco could not lawfully be caused to assume the \$50 million obligation to the Defendant Banks which it was caused to assume in the transaction complained of herein, in respect of the securities of Railroad, unless and until Pennco obtained the authority of the Interstate Commerce Commission ("ICC") to issue said notes and assume said liability. Such authority was, however, never obtained.

34. By reason of the foregoing, (a) said notes and said \$50 million obligation are void under Section 20a(11) of the ICA; and (b) the Defendant Banks conspired with Railroad to, and did, defraud Pennco, to the substantial benefit and unjust enrichment of the Defendant Banks, causing great harm and substantial damage to Pennco in the amount of at least \$50 million for which the Defendant Banks, as conspirators with Railroad, are liable.

THIRD COUNT AGAINST DEFENDANTS CHEMICAL,
MANUFACTURERS, IRVING, CHASE, MONTREAL,
AND BOULEVARD

35. This count is brought to enforce rights arising under the common law. This Court has jurisdiction of this count under the principle of diversity of citizenship.

36. The defendants named in this count are citizens of states other than Pennsylvania. (For purposes of this count, the term "Defendant Banks" shall refer to only those banks named in this Count.)

37. The amount in controversy exceeds the sum of \$10,000, exclusive of interest and costs.

38. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "3", "5" through "8", "9(a),(b),(c) and (e)," "10", "11" in so far as it applies to the banks named as defendants in this count, "12" through "22" and "24" through "28" hereof with the same force and effect as if set forth in full herein.

FOURTH COUNT AGAINST
ALL DEFENDANT BANKS

39. This count arises under the ICA, 49 U.S.C. Sections 1 et seq., an Act of Congress regulating commerce, and is brought to enforce rights arising under Sections 8 and 20a of the ICA, 49 U.S.C. Sections 8 and 20a. This Court has jurisdiction of this count under 28 U.S.C. Section 1337 and under Section 9 of the ICA, 49 U.S.C. Section 9.

CLASS ACTION ALLEGATIONS

40. Plaintiff brings this count as a class suit pursuant to Rule 23(b)(1)(A),(B) and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of herself and of all other preferred stockholders of Pennco similarly situated.

41. There are many thousands of persons who are members of the class, located in various parts of the country.

42. A. Plaintiff and her counsel, who are experienced in litigation on behalf of corporate stockholders, will fairly and adequately protect the interests of the class. Plaintiff's interest is to obtain relief for herself and the class for the violations of law set forth herein.

B. The similarity of plaintiff's claims to those of the class will assure that plaintiff fairly and adequately represents the interests of said class. Plaintiff and her counsel are prepared to, and intend to, prosecute this action vigorously.

43. There are numerous questions of law and fact that are common to the class. These include:

(A) Whether Railroad, through its stock ownership of Pennco, at the times herein mentioned, has controlled and continues to control Pennco so as to completely control and dominate the management of the affairs and business of Pennco, and determine its business decisions and policies.

(B) Whether Railroad has been in a precarious financial position, as alleged in paragraph "16" hereof.

(C) Whether any of the Defendant Banks was heavily invested in the securities of Penn Central prior to the filing by Railroad of its petition under the Bankruptcy Act and, if so, whether said bank or banks liquidated its holdings prior to the filing of said petition.

(D) Whether, at the times herein mentioned, Railroad has managed and operated Pennco, and has used its assets and credit, for the benefit of Railroad and to the detriment of Pennco, causing Pennco to enter into the transactions herein described for Railroad's benefit in disregard of the interests of Pennco and, if so, whether the Defendant Banks conspired with, and aided and abetted Railroad, in said transactions, as described herein.

(E) Whether, in or about early 1970, Railroad informed the Defendant Banks of its need for funds, disclosing non-public information, as described in paragraph "19" hereof.

(F) Whether, in or about early 1970, Railroad requested a loan from the Defendant Banks and, if so,

whether the Defendant Banks refused to lend funds directly to Railroad.

(G) Whether, in May or June, 1970, the Defendant Banks and Railroad conspired together to, and did, cause Pennco to borrow \$50 million from the Defendant Banks and transfer the proceeds of said loan to Railroad, as described in paragraph "20" hereof.

(H) Whether Pennco received any genuine consideration for its participation in said loan transaction.

(I) Whether, at the time of said loan transaction, the Railroad note or notes received by Pennco in said transaction was, or could reasonably be expected shortly to become, almost worthless and, if so, whether the Defendant Banks knew, or had reason to know, these facts at the time of said loan transaction.

(J) Whether the Defendant Banks were wilful conspirators with Railroad in said loan transaction, as alleged in paragraph "22" hereof.

(K) Whether the credit and resources of Pennco were used in said loan transaction for the benefit of the Defendant Banks instead of for proper business purposes of Pennco.

(L) Whether Pennco suffered damage, including damage to its credit standing, because of said loan transaction.

(M) Whether, as a result of said loan transaction, Pennco's financial structure has been seriously impaired to the point where the investment of the preferred stockholders in Pennco is endangered and Pennco's ability to pay monies due

to the preferred stockholders, and the market price of the preferred stock, have been substantially reduced.

(N) Whether, by reason of said loan transaction, the Defendant Banks conspired to, and did, defraud the preferred stockholders of Pennco, to the substantial benefit and unjust enrichment of the Defendant Banks and Railroad, causing great harm and substantial damage to the preferred stockholders of Pennco and, if so, by what amount were the Defendant Banks enriched and by what amount was each share of Pennco preferred stock damaged.

(O) Whether Pennco and Railroad are subject to the provisions of Chapter I of the ICA.

(P) Whether the notes that Pennco was caused to issue in the transaction complained of herein constituted more than 5% of the par value of Pennco securities outstanding at the time said notes were issued.

(Q) Whether, without the authority of the ICC, (i) said notes could be lawfully issued; and (ii) the \$50 million obligation to the Defendant Banks which Pennco was caused to assume in the transaction complained of herein, in respect of the securities of Railroad, could be lawfully assumed.

(R) Whether such authority was obtained from the ICC.

(S) Whether said notes and said \$50 million obligation are void under Section 20a(11) of the ICA.

44. A. The questions of law and fact that are common to the class predominate over questions affecting only individual members.

B. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

C. The frauds committed by the Defendant Banks were violations of the rights of all said preferred stockholders of Pennco. The interest of each preferred stockholder in prosecuting an individual action is minimal. The amount of damages sustained by each preferred stockholder is not, in all likelihood, large enough to make it economically feasible for each to institute an individual action against the Defendant Banks and the preferred stockholders will thus be discouraged from seeking individual redress.

D. A multiplicity of suits in various jurisdictions by preferred stockholders all over the United States with consequent burdens on the Courts and the Defendant Banks and the danger to individual preferred stockholders that the statute of limitations may run before they are, in fact, aware of their rights, should be avoided.

E. It would be virtually impossible for all of said preferred stockholders to intervene as parties plaintiff in this action.

F. To the best of the plaintiff's knowledge, information and belief, there is no pending litigation by members of the class other than the plaintiffs herein concerning the controversy.

G. When the liability of the Defendant Banks has been adjudicated, claims of all members of the class can be filed in, and determined by, this Court.

H. Pennco and all but 3 of the Defendant Banks do business, and maintain offices, in the City, County and State of New York and those three banks transact business in the City, County and State of New York. Important records and witnesses are located in or close to the City, County and State of New York.

I. This class action will foster orderly and expeditious administration of the class claims; economies of time, effort and expense will be fostered; and uniformity of decision will be ensured. This action presents an appropriate mechanism to prosecute the interests of all members of the class.

J. This action presents no difficulties which would impede its management by the Court as a class action.

SUBSTANTIVE ALLEGATIONS

45. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1", "5" through "22" and "31" through "33" hereof with the same force and effect as if set forth in full herein.

46. The credit and resources of Pennco were used in the transactions complained of herein for the benefit of the Defendant Banks instead of for the proper corporate and business interest of Pennco. As a result, Pennco has suffered substantial damage, including damage to its credit standing.

Since Railroad is now insolvent, Pennco will be unable to collect the \$50 million pursuant to the Railroad notes held by Pennco and thus Pennco has suffered at least \$50 million in damages.

47. As a result of said transactions, Pennco's financial structure has been seriously impaired to the point where the investment of the preferred stockholders in Pennco is endangered, Pennco's ability to pay monies due to the preferred stockholders, and the market price of the preferred stock, have been substantially reduced, and Pennco has, in fact, failed to pay dividend income due to the preferred stockholders.

48. By reason of the foregoing, (A) said notes that Pennco was caused to issue to the Defendant Banks in the transaction complained of herein and said \$50 million obligation to the Defendant Banks that Pennco was caused to assume in said transaction are void under Section 20a(11) of the ICA; and (B) the Defendant Banks conspired with Railroad to, and did, defraud the preferred stockholders of Pennco, to the substantial benefit and unjust enrichment of the Defendant Banks, causing great harm and substantial damage to the preferred stockholders of Pennco, for which the Defendant Banks, as conspirators with Railroad, are liable.

49. The exact amount of the benefit and unjust enrichment of the Defendant Banks and the exact amount of the damage to the preferred stockholders of Pennco is unknown to the plaintiff and can only be ascertained upon an accounting.

FIFTH COUNT AGAINST ALL
DEFENDANT BANKS

50. This count is brought to enforce rights arising under the common law. This Court has jurisdiction of this count under the principle of pendent jurisdiction.

51. Plaintiff repeats and realleges each and every class action allegation contained in paragraphs "40" through "42", "43(A) through (N)" and "44" hereof with the same force and effect as if set forth in full herein.

52. Plaintiff repeats and realleges each and every substantive allegation contained in paragraphs "1", "5" through "22", "46" and "47" hereof with the same force and effect as if set forth in full herein.

53. By reason of the foregoing, the Defendant Banks conspired to, and did, defraud the preferred stockholders of Pennco, to the substantial benefit and unjust enrichment of the Defendant Banks, causing great harm and substantial damage to the preferred stockholders of Pennco.

54. The exact amount of the benefit and unjust enrichment of the Defendant Banks and the exact amount of the damage to the preferred stockholders of Pennco is unknown to the plaintiff and can only be ascertained upon an accounting.

SIXTH COUNT AGAINST DEFENDANTS
CHEMICAL, MANUFACTURERS, IRVING,
CHASE, MONTREAL AND BOULEVARD

55. This count is brought to enforce rights arising under the common law. This Court has jurisdiction of this count under the principle of diversity of citizenship.

56. Plaintiff repeats and realleges each and every class action allegation contained in paragraphs "40" through "42", "43(A) through (N)" and "44" hereof with the same force and effect as if set forth in full herein.

57. Plaintiff repeats and realleges each and every substantive allegation contained in paragraphs "1", "5" through "8", "9(a),(b),(c) and (c)", "10", "11" in so far as it applies

to the defendants named in this count, "12" through "22," "36", "37", "46", "47", "53" and "54" hereof with the same force and effect as if set forth in full herein.

WHEREFORE, Plaintiff demands judgment:

A. As to the First, Second and Third Counts, against the Defendant Banks and in favor of Pennco, for the amount of all profits and benefits gained by the Defendant Banks and Railroad and all damages sustained by Pennco by virtue of the acts and transactions set forth in said Counts, plus exemplary damages.

B. As to the Fourth, Fifth and Sixth Counts, against the Defendant Banks and in favor of the preferred stockholders of Pennco, for the amount of all damages sustained by them by virtue of the acts and transactions set forth in said Counts, plus exemplary damages.

C. As to the First, Third, Fifth and Sixth Counts, (i) rescinding the transaction by which the Defendant Banks acquired Pennco's notes and requiring their delivery to Pennco and their cancellation upon delivery by Pennco of Railroad notes for \$50 million to the Defendant Banks; and (ii) declaring that the Pennco notes held by the Defendant Banks are void upon delivery by Pennco of the Railroad notes for \$50 million to the Defendant Banks.

D. As to the Second and Fourth Counts, declaring the notes that Pennco was caused to issue to the Defendant Banks in the transactions set forth in said Counts and the \$50 million obligation to the Defendant Banks that Pennco was caused to assume in said transactions, void.

26a

E. For the plaintiff, for the costs and disbursements of this action, including reasonable counsel fees and accounting fees.

F. For such other and further relief as the Court may deem just and proper.

WOLF POPPER ROSS WOLF & JONES

By: *Samuel Wolf*
A Member of the Firm

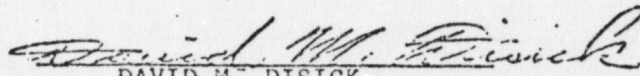
Attorneys for Plaintiff
845 Third Avenue
New York, New York 10022
Tel. PL9-4600

STATE OF NEW YORK)
) .ss:
COUNTY OF NEW YORK)

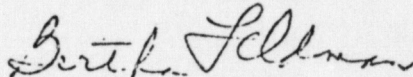
27a

DAVID M. DISICK, being duly sworn, deposes and says: That he is associated with the firm of Wolf Popper Ross Wolf & Jones, attorneys for the plaintiff in the within action; that he has read the foregoing Amended Complaint and knows the contents thereof; that the same is true to his own knowledge except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

This verification is made by deponent because the plaintiff resides in Bala Cynwyd, Pennsylvania, which is outside of the Southern District of New York and a considerable distance from the office of plaintiff's attorneys, which is located in the County, City and State of New York.


DAVID M. DISICK

Sworn to before me this
30 day of July, 1971.



BERTHA FELDMAN
Notary Public, State of New York
No. 41-1161725
Qualified in Queens County
Commission Expires March 30, 1973

⑤

2. Annexed hereto as Exhibit "A" is a copy of the amended complaint filed on or about October 23, 1970 on behalf of the plaintiff herein and another party in the action entitled Brody v. Penn Central Company, Common Pleas, Philadelphia County, June Term, 1970, No. 6793 ("Common Pleas Action"). The

Common Pleas Action is brought derivatively on behalf of Pennsylvania Company ("Pennco") and representatively on behalf of its preferred stockholders against Penn Central Company, the parent of Penn Central Transportation Company ("Railroad"), and former directors of Pennco challenging numerous transactions, including the acts of Railroad and the Pennco directors in connection with the loans challenged herein. (Paragraph 24).

3. Annexed hereto as Exhibit "B" are the preliminary objections and memorandum in support thereof filed on behalf of Pennco seeking to dismiss the amended complaint in the Common Pleas Action. Among the grounds urged by Pennco in support of its objections was lack of personal jurisdiction over Pennco in Pennsylvania since Pennco "is, and at all times has been, a Delaware corporation whose place of business, physical assets and employees are all located in Delaware...." (P. 1 of the preliminary objections. See also P. 1 of Pennco's memorandum).*

4. On June 29, 1970, the United States District Court for the Eastern District of Pennsylvania, in which the reorganization proceedings of Railroad are pending, entered an ex parte order temporarily restraining defendant banks from setting off deposits of Pennco against the loans outstanding to Pennco

* Subsequent to said objections and others that were filed, plaintiff began a similar action in the State Supreme Court in New York County and subsequent thereto, the parties agreed to a stay of the New York action on condition that various preliminary objections, including Pennco's objections to jurisdiction, would be withdrawn.

30a

under the Credit Agreement challenged herein. (Ex. "A" to the moving affidavit of John C.F. Clarke). Thereafter, Pennco petitioned to extend the term of the restraining order. The defendant banks opposed, filing a memorandum, a copy of which is annexed hereto as Exhibit "C". Defendant banks, in that memorandum, contended that the reorganization court had no jurisdiction over the assets of Pennco. See especially pp. 3 and 4 - 5.*

Benedict Wolf
BENEDICT WOLF

Sworn to before me this
28th day of January, 1972.

Bertha Feldman
Notary Public

BERTHA FELDMAN
Notary Public, State of New York
No. 41-1181793
Qualified in Queens County
Commission Expires March 30, 1973

* On argument of Pennco's petition, defendant banks represented that they contemplated no action with respect to the loans to Pennco in the near future. Based upon that representation, the court allowed the restraining order to expire without determining the jurisdiction issue.

31a
IN THE COMMON PLEAS COURT
OF PHILADELPHIA COUNTY

ANITA B. BRODY
438 Bryn Mawr Avenue
Bala Cynwyd, Pennsylvania

JUNE TERM, 1970

and

MARTIN S. WHITMAN and PHYLLIS :
W. BECK, Trustees for the :
Benefit of SELMA W. HAUSNER, :
et al., :

NO. 6793

-against-

PENN CENTRAL COMPANY
#6 Penn Center Plaza
Philadelphia, Pennsylvania

PAUL A. GORMAN
255 Oak Ridge Avenue
Summit, New Jersey

E. CLAYTON GENGAS
1000 Asylum Avenue
Hartford, Connecticut

EDWARD J. HANLEY
Oak Hill Farms
Allison Park, Pennsylvania

FRANK J. LUNDIG
1630 Sheridan Road
Wilmette, Illinois

ROBERT S. ODELL
420 Taylor Street
San Francisco, California

DAVID C. BEVAN
Idlewild Road
Gladwyne, Pennsylvania

OTTO N. FRENZEL
11 S. Median Street
Indianapolis, Indiana

FRED M. KIRBY
350 Park Avenue
New York, New York

THOMAS L. PERKINS
30 Rockefeller Plaza
New York, New York

32a

ALFRED E. PERLMAN
230 Park Avenue
New York, New York

STUART T. SAUNDERS
40 West Ardmore Avenue
Ardmore, Pennsylvania

DANIEL E. TAYLOR
8 Churchill Road
West Palm Beach, Florida

PENNSYLVANIA COMPANY
#6 Penn Center Plaza
Philadelphia, Pennsylvania

AMENDED COMPLAINT IN EQUITY

FIRST COUNT(ANITA BRODY vs. DEFENDANTS)

1. Plaintiff, Anita Brody, is an individual residing at 438 Bryn Mawr Avenue, Bala-Cynwyd, Montgomery County, Pennsylvania.

2. Defendant, Pennsylvania Company (Pennco), was at all times hereinafter mentioned and still is incorporated under the laws of the State of Delaware. Pennco does business in the Commonwealth of Pennsylvania at #6 Penn Center Plaza, Philadelphia, Pennsylvania, and elsewhere.

3. Defendant, Penn Central Company (Penn Central), at all times hereinafter mentioned was and still is incorporated under the laws of the Commonwealth of Pennsylvania, having been incorporated in this state on March 26, 1969 under the name of Penn Central Holding Company. It changed its name to Penn Central Company on October 1, 1969. Its Philadelphia office is located at #6 Penn Center Plaza, Philadelphia, Pennsylvania. Penn Central's stock is listed on the New York Stock Exchange.

4. Penn Central Transportation Company (Railroad) at all times hereinafter mentioned was and still is incorporated under the laws of the Commonwealth of Pennsylvania. Its name was changed from Penn Central Company to Penn Central Transportation Company on October 1, 1969.

34a

5. The individual defendants constitute all of the directors and former directors of Pennco from January 1, 1969 to the present. They were all directors of Railroad at the same time that they were directors of Pennco. All of the individual defendants, with the exception of defendants Robert S. Odell and Daniel E. Taylor, were also directors of Penn Central at the same time that they were directors of Pennco.

6. Plaintiff has been the owner and holder of shares of cumulative preferred stock of defendant, Pennco, since May 14, 1968, and at all times hereinafter mentioned, and still owns such stock.

7. Plaintiff brings this cause of action derivatively in the right and for the benefit of Pennco.

8. At all times hereinafter mentioned, Penn Central owned and still owns all of the outstanding stock of Railroad. Through this stock ownership, Penn Central, at all times hereinafter mentioned, has controlled Railroad; has selected and designated the directors of Railroad, almost all of whom are directors of Penn Central; has selected and designated officers of Railroad; and has controlled the policies, activities and affairs of Railroad. Railroad's chief officers are officers of Penn Central.

9. Pennco operates as an investment company. Its principal investments include holdings in railroad companies, controlling interests in real estate development companies, and all of the common stock of a pipe line company. At the end of 1969, 95.3% of its assets consisted of stocks and bonds, and other.

evidences of indebtedness.

10. Pennco's capital stock consists of 5,600,000 shares of common stock, of which 4,985,000 shares are issued and outstanding, and 730,000 shares of 4-5/8% cumulative preferred stock, \$100 par value, of which 705,786 shares are outstanding. The preferred stock can exercise voting rights if dividends are defaulted for six quarterly periods, in which event the preferred stockholders can elect two directors. At all times hereinafter mentioned all of the voting rights have been carried by the common stock.

11. All of Pennco's common stock is owned by Railroad. Its cumulative preferred stock is publicly owned.

12. Penn Central, through its ownership of all of Railroad's capital stock and Railroad's ownership of all of Pennco's common stock, at all times hereinafter mentioned, has controlled and continues to control Pennco. It has selected and designated the directors of Pennco, all of whom are directors of Railroad and the majority of whom are directors of Penn Central. It has selected and designated the officers of Pennco.

13. In the foregoing manner, Penn Central was able to and did completely control and dominate the management of the affairs and business of Pennco, and Pennco's business decision and policies were determined by Penn Central.

14. At all times hereinafter mentioned and continuing to date, Penn Central and its wholly-owned subsidiary, Railroad, have been in a fiduciary or a trust relationship to Pennco in all

36a

of the transactions and dealings of Penn Central and Railroad, jointly or separately, with Pennco. By reason of the fact that they were directors of Pennco the individual defendants owed a fiduciary duty to Pennco and its stockholders to exercise their business judgment for the best interests of Pennco and its stockholders.

15. Railroad has been in precarious financial condition for more than a year. It had a loss of more than \$56 million in 1969, and a loss of \$62.7 million in the first quarter of 1970. On a consolidated basis the loss for the first quarter of 1970 was \$79.6 million. It had a serious problem of liquidity which compelled it, on June 20, 1970, to file a petition under Section 77 of the Federal Bankruptcy Act. Penn Central and the individual defendants have been aware, since its organization, of Railroad's precarious position.

16. At all times hereinafter mentioned and continuing to the present time Penn Central, through Railroad, has managed and operated Pennco for the benefit of Penn Central and Railroad and to the detriment of Pennco, and has caused Pennco to enter into relationships and transactions with Railroad and has used the assets and credit of Pennco for their benefit in disregard of the interests of Pennco. The individual defendants have aided and abetted Penn Central and Railroad in these relationships and transactions. Instances thereof are set forth in the following paragraphs.

17. On March 31, 1970, Penn Central and the individual defendants caused Pennco to purchase from Railroad all of the

outstanding stock of Clearfield Bituminous Coal Company for \$16,900,000. This price was grossly excessive. It was determined by Penn Central arbitrarily, without arm's length bargaining. The transaction was solely for the benefit of Penn Central and Railroad, to the detriment of Pennco.

18. Penn Central and the individual defendants caused Pennco to sell \$50,000,000 of 9% sinking fund debentures on December 1, 1969, exchangeable for shares of Norfolk & Western Railway Company owned by Pennco. Upon receipt by Pennco of the proceeds of the sale of the debentures, Penn Central caused Pennco to turn the funds over to Railroad for an unsecured promissory note in the amount of \$49,000,000, bearing interest at 9 1/4%, this note being junior to approximately \$1.7 billion dollars of secured debt of Railroad.

19. The sale of the debentures and the loan to Railroad were not for any proper corporate purpose of Pennco, but were solely for the benefit of Penn Central and Railroad. Penn Central and the individual defendants caused Pennco to make said loan to Railroad without security, and junior to the said \$1.7 billion of Railroad's secured debt, with full knowledge of Railroad's precarious financial position.

20. Under the terms of the debentures, Pennco was required to have 610,002 shares of Norfolk & Western Railway Company ("NSW") stock available for exchange. In order to meet this requirement Pennco agreed to exchange on October 15, 1970, 595,255 shares of Wabash Railroad Company common stock owned by it for

671,692 shares of N&W common stock. In order to have Railroad report a \$51,000,000 profit on this exchange during the first quarter of 1970, the defendants caused Pennco to enter into the exchange on March 31, 1970 instead of October 15, 1970, thereby causing Pennco to lose in excess of \$2,000,000 in dividend income during 1970.

21. In order to help meet Railroad's cash needs, in July, 1969 Penn Central and the individual defendants caused Pennco to purchase from Railroad various securities, notes, warrants and bonds for \$35,000,000 in cash. Pennco used the proceeds of a sale of \$35,000,000 of 8 1/4% collateral trust bonds dated June 1, 1969 for this purchase. This purchase served no proper corporate purpose of Pennco.

22. The price paid by Pennco to Railroad for the aforesaid stock, notes, warrants and bonds was grossly excessive. It was arbitrarily fixed by Penn Central and the individual defendants, without arm's length bargaining and without consideration for the needs or welfare of Pennco. The notes, warrants and bonds had and have no ready market. They have substantially decreased in value since the purchase. Included in the purchase were 1,462,109 shares of common stock of Madison Square Garden Corporation at a price of \$11.078 per share. On August 26, 1970, this stock was sold for \$3.75 a share. The highest price it sold for in 1970, prior to August 26, was \$6.625 a share.

23. In order to sell the aforesaid \$35 million of trust bonds and make the cash available for Railroad, Pennco was compelled to pledge as security, inter alia, all of its common stock in

Buckeye Pipe Line Company, valued by it at \$98 million.

24. In or about May or June, 1970, Penn Central and the individual defendants caused Pennco to borrow \$50 million from a group of banks and transfer the proceeds of the loans to Railroad and its subsidiaries. This loan was not intended to and did not serve any proper business or corporate purpose of Pennco.

25. In or about May, 1970, Penn Central and the individual defendants caused Pennco to seek to sell \$100 million of sinking fund debentures for the purpose of raising cash which was to be turned over to Railroad partially to purchase certain properties of Railroad at prices substantially in excess of their value and partially as a loan. The proposed financing was not intended to and did not serve any proper business or corporate purpose of Pennco. The debentures were to bear an interest rate of approximately 10 1/2%. A preliminary prospectus covering the debentures was issued. Thereafter Penn Central and the individual defendants caused Pennco to cancel the proposed financing. As a result of the proposed financing and its cancellation Pennco incurred substantial expense.

26. As a result of all of the foregoing, and of other similar activities, the specific nature of which are not now known to plaintiffs, Pennco has suffered substantial damage to its credit standing and has undergone substantial expense.

27. In addition to the foregoing, Pennco has been caused by Penn Central and the individual defendants to purchase other securities from Railroad. In each case the price was determined on the basis of what Railroad paid for the securities. On the dates of purchase the market value (or underlying equity value) of the security was substantially lower than the price paid by Railroad. As a result Railroad was benefitted and Pennco was substantially damaged.

28. Commencing in early 1970, Penn Central embarked on a series of investments in non-railroad securities, thus operating in direct competition with Pennco. Pennco is without safeguard which will protect it from diversion of corporate opportunities from it to Penn Central.

29. In February, 1970, Penn Central purchased all the outstanding stock of Southwestern Oil and Refining Company and Royal Petroleum Corporation. These were purchases which fell within the investment objectives of Pennco. Pennco had sufficient funds to purchase said companies. Their purchase by Penn Central was an improper diversion of corporate opportunities from Pennco to itself, to Pennco's detriment and Penn Central's benefit.

30. By the acts and transactions hereinabove set forth and others, the specific nature of which are not now known to plaintiff, Penn Central has breached its fiduciary duties and trust obligations to Pennco, to the substantial benefit and unjust enrichment of Penn Central, thereby causing great harm and substantial damage to Pennco. It has failed to use the assets of Pennco for

Pennco's proper business and corporate purposes and has wasted said assets.

31. By the acts and transactions described above, the individual defendants were derelict in their duties and fiduciary responsibilities to Pennco. Their conduct, as set forth above, was reckless, careless and grossly negligent. Their acts evidenced wanton disregard of the resultant damage and injury to Pennco.

32. The exact amount of the benefit to and unjust enrichment of Penn Central and the exact amount of damages to Pennco is unknown to plaintiff and can only be ascertained upon an accounting.

33. Plaintiff has made no demand on the Board of Directors of Pennco to take action with regard to the wrongs herein described because all of said directors are directors of Penn Central and all of said directors have participated in, authorized and approved the acts and transactions herein described. They have taken no steps to prevent or avoid such acts and transactions or the consequences thereof, although they have known of them at all times herein mentioned. Furthermore, all of the directors are defendants in this action and to make demand upon them would be to request they sue themselves. By reason of the foregoing, any demand upon said Board of Directors to redress or prevent the wrongs herein described would have been futile.

34. Plaintiff has no adequate remedy at law, and unless the relief hereinafter requested is granted, plaintiff will sustain immediate and irreparable injury.

SECOND COUNT

(ANITA BRODY vs. DEFENDANTS)

35. Plaintiff brings this count representatively as a class action on behalf of the preferred stockholders of Pennco.

36. Said preferred stockholders constitute a class so numerous as to make it impractical to bring them all before the Court. There are more than 4800 preferred stockholders. The claims of the plaintiff are the same as those of the entire class. Plaintiff will fairly and adequately protect the interests of the entire class of persons on whose behalf this count is brought.

37. Questions of law and fact common to all members of said class are involved herein.

38. Pennco, the individual defendants and Penn Central at all times hereinafter mentioned and continuing to date have been in a fiduciary or trust relationship to the preferred stockholders of Pennco.

39. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs "1" through "6" and "8" through "27" of this Complaint.

40. As of December 31, 1969, investments of Pennco in the amount of \$234,567,000 as well as substantially all of Pennco's properties, were pledged as security for loans or were otherwise restricted.

43a

41. All of these pledges were made for the benefit of Railroad or Penn Central and were not made to serve any proper business or corporate purposes of Pennco. They were made in reckless disregard of the interest of the preferred stockholders of Pennco.

42. While the balance sheet of Pennco, as of December 31, 1969, showed a considerable sum in common stock value and retained earnings, these being presumably junior to the preferred stock, the figures upon which this is based are not a true reflection of present values. Thus the market value of Great Southwestern Corporation stock has been substantially decreased from \$250.6 million on May 9, 1970 to approximately \$77 million on August 25, 1970. In view of Pennco's position as a large unsecured creditor of Railroad, the value of Pennco's assets have been further adversely affected to a very substantial degree by the filing by Railroad of a petition under Section 77 of the Bankruptcy Act due to its inability to meet its obligations.

43. As a result of the activities undertaken by Pennco for the benefit of Penn Central and Railroad, hereinbefore set forth, the market price of the stock held by the preferred stockholders has been sharply reduced and the safety of their investment greatly diminished.

44. The credit and resources of Pennco have been used during the period since May 14, 1968 and earlier for the benefit of Penn Central and Railroad instead of for the proper corporate and business interest of Pennco. As a result, Pennco has suffered substantial financial loss and damage to its credit standing. Because Pennco is

44a

a large unsecured creditor of Railroad, the filing by Railroad of a petition under the Bankruptcy Act has further harmed Pennco to the point where its ability to protect the interests of its preferred stockholders has been seriously weakened.

45. After December 31, 1969, the Pennco purchase from Railroad of the stock of Clearfield Bituminous Coal Company for the inflated price of \$16,900,100; Pennco's exchange of 595,255 shares of Wabash Railroad Company stock for 671,692 shares of N&W common stock on March 31, 1970; Pennco's borrowing of \$50 million and subsequent transfer of the proceeds to Railroad in May or June, 1970; and other activities of Pennco, have further jeopardized the safety of the preferred shareholders' investment and reduced the value of their preferred shares.

46. By the acts and transactions hereinabove set forth, the defendants have breached their fiduciary duties and trust obligations to the preferred stockholders of Pennco, to the substantial benefit and unjust enrichment of Penn Central, thereby causing great harm and substantial damage to the preferred stockholders of Pennco.

47. The exact amount of the benefit and unjust enrichment of Penn Central and the exact amount of the damage to the preferred stockholders of Pennco is unknown to plaintiff and can only be ascertained upon an accounting.

THIRD COUNT

(MARTIN S. WHITMAN and PHYLLIS W. BECK vs. DEFENDANTS)

48. Plaintiffs, Martin J. Whitman and Phyllis W. Beck, Trustees F.B.O. Selma W. Hausner, et al., ("Whitman Trust") bring

45a

this count on behalf of the former preferred stockholders of Pennco who subsequent to June 21, 1970 either sold Pennco preferred shares or converted said preferred stock into shares of common stock of N&W.

49. Said former preferred stockholders constitute a class so numerous as to make it impractical to bring them all before the Court. The claims of plaintiff, Whitman Trust, are the same as those of the entire class. Plaintiff will fairly and adequately protect the interests of the entire class of persons on whose behalf this Count is brought.

50. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs "2" through "6", "8" through "27", "37" and "39" through "42".

51. Each share of Pennco preferred stock, at the option of the holder, was at all times hereinafter mentioned and is at present convertible into .73 shares of N&W common stock.

52. On or about July 1, 1970, plaintiff as a result of activities undertaken by Pennco for the benefit of Penn Central and Railroad, hereinabove set forth, converted 100 shares of Pennco preferred stock into shares of N&W common stock.

53. As a result of the activities undertaken by Pennco for the benefit of Penn Central and Railroad, hereinabove set forth, the market price of the stock held by the preferred stockholders was so sharply reduced as to cause plaintiff and other preferred stockholders to convert their preferred stock into N&W common, or

46a

sell the preferred stock at prices lower than the price at which the stock would have traded if not for the aforesaid activities.

54. Plaintiff repeats and realleges paragraph "44".

55. By the acts and transactions hereinabove set forth, the defendants have breached their fiduciary duties to plaintiff Whitman Trust and all other members of the class to the substantial benefit and unjust enrichment of Penn Central, thereby causing great harm and substantial damage to plaintiff and all other members of the class.

56. The exact amount of the benefit and unjust enrichment to Penn Central and the exact amount of the damage to Plaintiff Whitman Trust and all other members of the class is unknown to plaintiff and can only be ascertained upon an accounting.

WHEREUPON, plaintiff prays this Court

A. Preliminarily, on the First and Second Counts,

1. To enjoin Penn Central Company, Pennsylvania Company and the individual defendants from causing Pennsylvania Company to transfer assets to or purchase assets from Penn Central Transportation Company, or in any way to lend Pennsylvania Company's credit to Penn Central Transportation Company, without further order of this Court;

2. To appoint a Receiver to take possession of all the assets and property of Pennsylvania Company within the jurisdiction of this Court, and to operate its business and do any and all things which in his judgment may be necessary for the operation,

47a

preservation and protection of the property and interests under his care and control, until further order of this Court; or, alternatively,

3. To appoint a representative of the preferred stockholders of Pennsylvania Company to sit until final trial of this action as an observer on its Board of Directors with all the rights and privileges of a Director, but with no right to vote, in order to enable the preferred stockholders to take appropriate action at the inception of any proposed intercompany transaction that will be detrimental to the interests of Pennsylvania Company.

B. Permanently

1. To require Penn Central Company and the individual defendants to account to Pennsylvania Company for all profits and benefits gained by Penn Central Company and Penn Central Transportation Company and all damages sustained by Pennsylvania Company through the acts of Penn Central Company and the individual defendants as set forth in the First Count.

2. To enter judgment against Penn Central Company and the individual defendants and in favor of Pennsylvania Company for the amount of said damages.

3. To require the defendants to account to the preferred stockholders for all damages sustained by them by virtue of the acts and transactions set forth in the Second Count.

4. To enter judgment against the defendants and in favor of the preferred stockholders for the amount of said damages.

48a

5. To require the defendants to account to plaintiff Whitman Trust and all other persons who were caused to convert Pennco preferred stock into N&W common stock or sell the preferred stock by virtue of the acts and transactions set forth in the Third Count.

6. To enter judgment against the defendants in favor of the plaintiff Whitman Trust and all other members of the class for the amount of said damages.

7. To grant plaintiffs the costs and disbursements of this action, including reasonable counsel fees and accounting fees.

8. To grant plaintiff such other and further relief as the Court may deem just and proper.

GOODIS, GREENFIELD, NARIN & MANN

By: *Theodore R. Mann*
THEODORE R. MANN

Allen J. Levin
ALLEN J. LEVIN

OF COUNSEL:

WOLF POPPER ROSS WOLF & JONES
845 Third Avenue
New York, New York

AFFIDAVIT

Commonwealth of Pennsylvania

: ss

County of Philadelphia

ANITA BRODY, being duly sworn according to law, deposes and says that she has been authorized by all plaintiffs to take this affidavit on their behalf, that she has read the within Amended Complaint, and that it is true and correct to the best of her knowledge, information and belief.

Anita Brody
ANITA BRODY

Sworn to and subscribed
before me this 23 day
of October, 1970.

Margaret M. Hyde
Margaret M. Hyde,
Notary Public, Phila., Phila. Co.
My Commission Expires April 12, 1972.

COMMON PLEAS COURT OF
PHILADELPHIA COUNTY
JUNE TERM 1970
NO. 6793

ANITA B. BRODY
and
MARTIN S. WHITMAN and
PHYLLIS W. BECK, Trustees
for Benefit of SELMA W.
HAUSNER et al
vs.
PENN CENTRAL COMPANY
et al

AMENDED COMPLAINT
IN EQUITY

THEODORE R. MANN, ESQ.
GOODIS, GREENFIELD,
NARIN & MANN
ATTORNEYS AT LAW
1315 WALNUT STREET
PHILADELPHIA, PA. 19107
KI 6-9200

ANITA B. BRODY, et al. : COURT OF COMMON PLEAS
v. : JUNE TERM, 1970
PENN CENTRAL COMPANY, et al. : NO. 6793

PRELIMINARY OBJECTIONS
OF PENNSYLVANIA COMPANY

Pennsylvania Company, one of the defendants, comes by its attorney and files the following Preliminary Objections to plaintiffs' Complaint and Amended Complaint:

Petition Raising Questions
of Jurisdiction and Venue

1. This Court has no personal jurisdiction of the defendant for the following reasons:

(a) This defendant is, and at all times has been, a Delaware corporation whose place of business, physical assets and employees are all located in Delaware, and which conducts no business and pays no taxes in Pennsylvania.

(b) Plaintiffs have purported to serve this defendant by registered mail, through the Secretary of the Commonwealth, pursuant to Section 1011 of the Business Corporation Law, 15 P.S. §2011. However, such service is a nullity in this case, because it is authorized by statute only in situations in which a foreign corporation "*** shall have done any business in this Commonwealth, without procuring a Certificate of Authority to do so from the Department of State ***";

stated above, this defendant does no business in this Commonwealth, nor has it done so.

2. The venue of this case is improper, because this defendant has no registered office or principal place of business in this county and does not regularly conduct business here. Furthermore, plaintiffs' cause of action did not arise here, nor did there occur in this county any transaction or occurrence out of which plaintiffs' cause of action arose.

Motion to Strike Off Or
For More Specific Pleading

3. Plaintiffs' Complaint and Amended Complaint are vague and indefinite and violate subparagraphs (a) and (h) of Pennsylvania Rule of Civil Procedure No. 1019 in that, while the question of whether plaintiffs as preferred shareholders have a right to prosecute a proceeding such as this is entirely dependent upon their contractual rights as preferred shareholders, plaintiffs have failed to aver whether that contract is oral or written; failed to attach a copy of the written contract on which their rights are in fact based, and failed even to summarize accurately and in detail the material terms of the contract.

Lack of Capacity to Sue

4. Although this defendant believes that, because of the deficiency in the plaintiffs' pleadings referred to above, this Court cannot as yet determine whether plaintiffs have capacity to institute this suit, it is this defendant's position that, as a matter of fact, plaintiffs lack such capacity because

they are preferred shareholders who have no right to bring this action on behalf of themselves or, derivatively, on behalf of Pennco because their rights with respect to Pennco are determined solely by their contract with Pennco, and no breach or anticipated breach of that contract has occurred or even been alleged.

Failure to Join Indispensable Party

5. Penn Central Transportation Company, which owns all of this defendant's common stock, is an indispensable party to this case, because claims are made for alleged unjust enrichment and alleged breach of fiduciary duty by diversion of assets to Penn Central Transportation Company and, in addition to damages, plaintiffs seek to limit significantly the powers of this defendant, and to have a receiver appointed to take possession of its assets, even though Penn Central Transportation Company is the owner of all Pennco common stock; Penn Central Transportation Company is also a necessary party because plaintiffs also seek an accounting "for all profits and benefits gained" by Penn Central Transportation Company.

Abstention

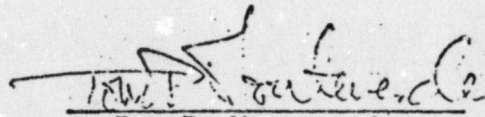
6. This Court should not exercise jurisdiction in this instance because the suit entirely pertains to the internal affairs of a foreign corporation which has done no business in this Commonwealth. This is especially so since determination of the rights and relevant positions of the parties depends entirely on Delaware law.

54a

Adequate Remedy At Law

7. In the event the other objections raised here are overruled, this case should be transferred to the law side of the Court, where plaintiffs have an adequate remedy.

WHEREFORE, Pennsylvania Company asks that this suit be dismissed or, in the alternative, that plaintiffs be required to comply with the other Objections raised herein.



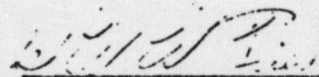
Tom P. Monteverde
Attorney for Defendant
Pennsylvania Company

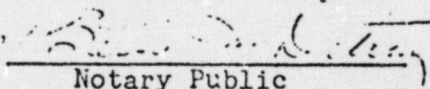
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STATE OF DELAWARE :
COUNTY OF NEW CASTLE: ss

Personally appeared before me, the undersigned authority, W. W. RILEY, who, being by me first identified and duly sworn according to law, deposes and says that he is the Secretary-Treasurer of Pennsylvania Company; that, as such, he has been authorized to execute this affidavit on its behalf, and that the facts set forth in the foregoing Preliminary Objections are true to his knowledge, to the extent that he has personal knowledge, and are otherwise true to the best of his information and belief.

Sworn to and subscribed
before me this 1st
day of February, 1971.


W. W. Riley


Notary Public

ANITA B. BRODY, et al. : COURT OF COMMON PLEAS
v. : JUNE TERM, 1970
PENN CENTRAL COMPANY, et al. : NO. 6793

MEMORANDUM OF PENNSYLVANIA COMPANY
IN SUPPORT OF ITS PRELIMINARY OBJECTIONS

1 - 2. Questions of Jurisdiction and Venue.

Plaintiffs have sought to serve this defendant ("Pennco") by registered mail through the Secretary of the Commonwealth pursuant to Pa. R.C.P. 2180(c) and Section 1011(B) of the Pennsylvania Business Corporation Law (Act of May 5, 1933, P. L. 364, Art. X, §1011B, as amended, 15 P.S. 2011B). These authorities authorize such service upon "any foreign business corporation which shall have done any business in this Commonwealth, without procuring a certificate of authority to do so from the Department of State ***."

Pennco is a Delaware corporation whose place of business, assets, and employees are all located in Delaware. Pennco is not registered to do business in Pennsylvania and conducts no business and pays no taxes in Pennsylvania. Accordingly, the purported service of Pennco is a nullity.

In addition, the venue is improper as to Pennco because plaintiffs' claims against Pennco do not meet any of the criteria for venue established by Pa. R.C.P. 2179. Specifically, Pennco

does not have its registered office or principal place of business in this county and does not regularly conduct business here. Furthermore, neither plaintiffs' alleged cause of action as to Pennco, nor any transaction or occurrence out of which that alleged cause of action as to Pennco arose, took place in this county. All of the actions complained of on the part of Pennco and its directors took place as a result of meetings of the Pennco directors, and all of those were held outside Pennsylvania.

3 - 4. Plaintiffs' Lack of Capacity to Sue; the Insufficiency of Plaintiffs' Pleadings In That Regard.

Count I of plaintiffs' Complaints sets forth what is, avowedly, a derivative claim asserted on behalf of Pennco. While Counts II and III purport to be class actions asserting claims on behalf of present and former preferred shareholders of Pennco, these Counts, like the first Count, allege waste and mismanagement, allegedly damaging to Pennco and, therefore (but indirectly), to the classes on whose behalf plaintiffs purport to sue. Accordingly, all of plaintiffs' claims are derivative claims. See BEEBER v. WILSON, 285 Pa. 312, 316 (1926); Cf. KNAPP v. BANKERS SECURITIES CORP., 230 F. 2d 717 (3rd Cir. 1956). To the same effect, see ROUTSIS v. SWANSON, 270 N.Y.S. 2d 908 (App. Div. 1966), and DALE v. CITY PLUMBING & HEATING SUPPLY CO., 146 S.E. 2d 349 (Ga. Ct. App. 1965).

A preferred shareholder, in order to maintain a derivative suit, must show injury to himself, in addition to injury to the corporation. 13 Wetcher, Encyclopedia of Corporations, §5948.

Plaintiffs are holders of Pennco cumulative preferred stock; they do not own any of Pennco's common stock, all of which is owned by Penn Central Transportation Company. A preferred stockholder's rights are fixed and limited by contract, and he has no standing to complain, even derivatively, unless those contractual rights are endangered.

In commenting on a suit by a preferred stockholder to recover promoters' profits for the corporate treasury, Professor Adolph A. Berle said (in Bankers and Promoters Stock Profits, 42 Harv. L. Rev. 748, 760 (1929):

"An incoming shareholder, holding a security which carried a preference both as to liquidation and dividends, and whose rights on both are limited, presumably has no cause to complain, provided the shares issued to the ... promoter do not impair the safety of his preferences. It will be noted that the foregoing applies only to those securities in which there is a preference as to liquidation, accompanied by a limitation of the amount receivable... If his dividend be preferred ... he has no standing on that score ... (unless) ... he holds a participating preferred stock ..."

Professor Berle's view was accepted and applied in the leading case of Jeffs v. Utah Power & Light Co., 12 Atl. 2d 592 (Supreme Jud. Court Maine 1940). There, suit was brought by five preferred stockholders to recover for the corporation unfair promoters' profits. It was claimed that the promoters had transferred property to the corporation of a smaller value than the consideration received. The Court stated that a "fundamental reason" why plaintiffs' suit should be dismissed was that it "is impossible to see how they have been damaged . . ." (p. 600).

Pointing out that when plaintiffs purchased their preferred stock the corporate assets were sufficient to cover all

corporate indebtedness plus the par value of the preferred stock, still leaving ample equity for the common stockholders, the court said:

"There is nothing in this bill to show that the shares of stock issued to these promoters [in consideration of the assets sold by the promoters to the Corporation] in any way impaired the security of plaintiffs' stock or any preference to which it was entitled. The preferred stockholders . . . had no interest in the share of the corporate assets of those holding securities junior to theirs, nor in the earnings which might accrue over and above the amount necessary to satisfy the dividends on the preferred stock . . . A plaintiff, who can show no injury to himself by reason of the facts of which he complains, surely has no standing in court." (12 Atl. 2d at p. 600)

Other courts have also recognized the soundness of requiring that preferred stockholders show some injury to their rights before they can maintain an action against the corporation. See Guttmann v. Illinois Central R. Co., 189 F. 2d 927, 930 (2d Cir. 1951), cert. den. 342 U.S. 327, 72 S. Ct. 107 (1951); Welch v. Atlantic Gulf & West Indies SS Lines, 101 F. Supp. 257, 260 (E.D. N.Y. 1951).

In Gipson v. Bedard, 173 Minn. 104, 108, 217 N.W. 139, 140 (1927), the court dismissed on the pleadings an equity action by a preferred stockholder to rescind the purchase by the corporation of its common stock, on this ground:

"The preferred stock . . . has . . . a preference, under the provisions of the articles which constitute the contract, over the common stock as to certain earnings of the corporation and as to assets on dissolution for a stated amount. But there is no allegation of any violation of the contract in these respects . . ."

Similarly, in Barrett v. W. A. Webster Lumber Co., 275 Mass. 302, 308, 175 N.E. 765, 768 (1931), the court dismissed a class action brought by a preferred stockholder to restrain enforcement of notes issued in payment for common stock which had been redeemed by the corporation. The court stated.

"As the findings show that at the time the notes were given the fair value of the assets of the company exceeded its liabilities exclusive of its capital stock, and that if the company had been liquidated at that time, all its debts and its entire outstanding preferred stock could have been paid in full, we are of the opinion that the purchase of the stock held by Henry was not illegal. In the event of liquidation at that time the only persons who could have suffered a loss were holders of the common stock who authorized the purchase of Henry's stock."

Pa. R.C.P. 1019 requires that "The material facts on which a cause of action *** is based *** be stated in a concise and summary form"; also that, "A pleading *** state specifically whether any claim *** is based upon a writing. If so, the pleader shall attach a copy of the writing, or the material part thereof ***."

Plaintiffs' pleadings fail to comply with the foregoing mandates, and if this action is not dismissed as to Pennco for any of the other reasons set forth in the Preliminary Objections, plaintiffs should at least be required to amend their Complaint so as to plead the written contract on which plaintiffs' rights, if any, are based; the amended pleading should also set forth "the material facts", if any, which establish any actual or anticipated violation of plaintiffs' contractual rights on the part of Pennco.

We do not believe that, ultimately, plaintiffs will be

able to meet this obligation. Their contract with Pennco provides that, as preferred shareholders, they are entitled to $4 \frac{5}{8}\%$ cumulative, annual dividends, calculated on the \$100 par value of each share, before any dividends are paid on the common stock. Also, in the event of liquidation, preferred stockholders are to be paid the par value of their shares plus unpaid dividends and, in certain cases, a small premium per share, before any distribution is made on the common stock. It is explicitly provided that the preferred shareholders are entitled to no other participation in the earnings or assets of the corporation. Furthermore, preferred shares are subject to redemption for specified prices and at specified times.

In the clearest terms, therefore, when and if plaintiffs plead the contract on which they must ultimately rely, it will be apparent that their interest in Pennco's profits and assets are capable of exact mathematical calculation, and it will not be possible for them to establish that those rights have been, or are likely to be, impaired.

5. Failure to Join Indispensable Party.

Plaintiffs seek relief, including the appointment of a receiver and an accounting of profits, for the alleged manipulation of Pennco's affairs by common directors for the benefit of Penn Central Transportation Company, which owns all of Pennco's common stock. Penn Central Transportation has not been made a party to this proceeding, but it is clear that Penn Central Transportation is an indispensable party. Accordingly, if this case is not dismissed entirely, it must be stayed until the

Transportation Company is joined and served.

The general rule is stated thus in 8 Standard Pennsylvania Practice (at pp. 66-67):

"Persons whose interests will necessarily be immediately affected by any decree that can be rendered are so necessary and indispensable as parties that the court will not proceed without them. Accordingly, a bill which fails to join a necessary and indispensable party defendant is fatally defective.

"The rule as to indispensable parties is neither technical nor one of convenience; it goes to the jurisdiction of the court. Consequently, the objection can be raised at any time, including upon appeal."

(At p. 450):

"Persons whose interests will necessarily be immediately affected by any decree that can be rendered are so necessary and indispensable as parties that the court will not proceed to a decree without them. The reason for the rule is found in the principle of public policy enforced in courts of equity that a decree should finally and completely determine the rights which all persons have in the subject matter decided, so that the parties may safely obey and act upon the decree and all other proceedings may be avoided. ***"

REIFSNYDER, Aplnt. v. PGH. OUTDOOR ADV. CO., 396 Pa. 320 (1959), was a minority stockholder's suit against a corporation and its directors in which the plaintiff sought to void, on behalf of the corporate defendant, a transaction under which the corporate defendant, using primarily the proceeds of a loan obtained from Equitable Life Assurance Society, purchased the controlling stock in the corporate defendant from what was then its parent corporation at a price which was allegedly excessive. The trial court dismissed plaintiff's bill after a hearing on the merits. The Supreme Court of Pennsylvania affirmed, but on the

ground that the parent corporation, as well as Equitable Life, were indispensable parties and they had not been made parties in the case. Said the Court (at pp. 325-326):

"Because of the unusual facts, and the appellant's charges of breach of fiduciary duty, we have discussed the merits at some length. However, we intend to decide this appeal on another point.

"Plaintiff's complaint prayed for a decree voiding all acts of Pittsburgh, and requiring all the transactions to be voided and the status quo to be restored. Obviously, that is impossible. In order to rescind the purchases and to return to General the stock which was purchased by Pittsburgh, and to invalidate and repay to Equitable the loan which it made to Pittsburgh -- General Outdoor Advertising Company, Inc., and the Equitable Life Assurance Society would have to have been joined as indispensable parties, defendants. Plaintiff's failure to join these indispensable parties in the present suit leaves a Court of Equity without jurisdiction to grant the relief prayed for or any substantial relief whatever, and the appeal must be quashed.

"In Powell v. Shepard, 381 Pa. 405, 113 A. 2d 261, the Court said (page 412): 'The absence of indispensable parties goes absolutely to the jurisdiction, and without their presence the court can grant no relief': Hardley v. Langkamp and Elder, 243 Pa. 550, 556, 90 A. 402 ... And, a party is indispensable where his rights are so connected with the claims of the litigants that no decree can be made between them without impairing such rights: . . ."

This Court could not appoint a receiver for Pennco without directly and materially affecting Penn. Central Transportation's rights as the owner of all of Pennco's voting stock; also, it simply would not be possible for the present defendants to account for any benefits which the Transportation Company might

have obtained improperly as the result of any transaction with Pennco unless the Transportation Company were a party to the case. For these reasons alone the Transportation Company is an indispensable party to this case. However, there is still another reason. The defendants other than Pennco are alleged to have taken improper action for the benefit of the Transportation Company, and for that reason, too, the Transportation Company is an indispensable party. This follows from the holding in *POWELL v. SHEPARD*, 381 Pa. 405 (1955), where the Court said (at p. 411):

"Since the defendant is merely the agent of the Secretary of Revenue for the collection of the State realty transfer tax, it follows that the Secretary is an indispensable party to the instant proceeding. ***"

It should also be noted that, if this case must be dismissed as to Pennco, as for reasons of jurisdiction or venue, the case must be dismissed as to all parties, since Pennco, the corporation allegedly injured by the allegedly improper actions of the other defendants, is an indispensable party to the case for that reason. *KELLY v. THOMAS*, 234 Pa. 419, 428 (1912).

6. Abstention.

For well over 100 years, even before the decision of Judge Sharswood in MORRIS v. STEVENS, 6 Phila. Rep. 488 (1868), it has been a fundamental rule of Pennsylvania jurisprudence that a Pennsylvania court will not issue an injunction or otherwise act to interfere in the affairs of a foreign corporation.

The Pennsylvania rule of non-interference continues today, as Mr. Justice O'Brien pointed out in MOORE v. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, 425 Pa. 204, 229 A. 2d 477 (1967) (at pp. 208-209):

"We said, more recently, in NAT. BAPTIST CONV., U.S.A., INC. v. TAYLOR, 402 Pa. 501, 166 A. 2d 521 (1961), pp. 504, 505: 'The general rule is that while courts of one state have power to assume jurisdiction of actions by non-residents against foreign corporations, they will not ordinarily interfere in controversies relating merely to the internal management of the affairs of the foreign corporation. Wet-
tengel v. Robinson, 288 Pa. 362; Cunliffe v. Consumers Association of America, 280 Pa. 263; Loan Society of Phila. v. Eavenson, 241 Pa. 65; Madden v. Electric Light Co., 181 Pa. 817; Bailey v. Ancient Egyptian Arabic Order, 162 Pa. Superior Ct. 5. ***'"

Among other things, the plaintiffs in this case seek to enjoin Pennco directors from transferring or purchasing assets and making loans. Plaintiffs also seek to have a receiver appointed to operate Pennco's business and to have a representative of the preferred shareholders appointed to act as an observer on the Pennco board. All of these are actions which fall within the area in which Pennsylvania courts have consistently abstained from interfering when a foreign corporation is involved.

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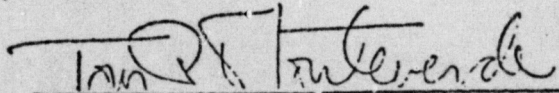
See, in this connection, MADDEN v. PENN ELECTRIC LIGHT CO., 181 Pa. 617 (1897), where it was said (at p. 622):

****What constitutes internal management is well defined by Stone, J., in Mining Co. v. Field, 64 Md. 154: 'Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation; and in case of a foreign corporation our courts will not take jurisdiction.'"

In KELLY v. THOMAS, 234 Pa. 419 (1932), supra, these principles were applied to explain abstention, in the face of charges very much like those made here.

7. Adequate Remedy at Law.

As we have pointed out before (in Part 3 - 4 of this Memorandum), the interest which plaintiffs have in Pennco is specifically defined by contract and subject to specific calculation. Accordingly, the law side of the Court provides plaintiffs with an adequate remedy for any injury to that interest.



Tom P. Monteverde
Attorney for Defendant,
Pennsylvania Company

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter : In Proceedings for the
of Reorganization of a
PENN CENTRAL TRANSPORTATION : Railroad
COMPANY, Debtor : No. 70

MEMORANDUM IN OPPOSITION TO CONTINUATION OF
THE RESTRAINING ORDER ENTERED JUNE 29, 1970

STATEMENT

This Memorandum is filed in opposition to the Debtor's petition to extend the term of the Order dated June 29, 1970, restraining 10 banks ("the Banks") from "appropriating and setting off deposit accounts and balances of the Pennsylvania Company with said Banks against claims of the Banks and from commencing or continuing any form of legal action against Pennsylvania Company". The Order originally was granted on the ex parte petition of Penn Central Transportation Company ("Penn Central"), Debtor in the reorganization proceeding under Section 77 of the Bankruptcy Act, and by its own terms expires on July 16, 1970 unless extended by further Order of this Court.

The Banks named in the Order are Chemical Bank, Manufacturers Hanover Trust Company, The Chase Manhattan Bank (National Association), Irving Trust Company, Mellon National Bank and Trust Company, Bank of Montreal (New York Agency), Girard Trust Bank, Fidelity Bank, Pittsburgh National Bank, and National Boulevard Bank.

All of these Banks join in this Memorandum.

Penn Central is a railroad corporation organized and doing business under the law of Pennsylvania with its principal place of business in Philadelphia, Pennsylvania. On June 21, 1970, Penn Central filed with this Court a petition for reorganization under Section 77 of the Bankruptcy Act, asserting that it was unable to meet its debts as they mature.

The Order, which is the subject of this memorandum, is addressed to creditors of Pennsylvania Company ("Pennco"), as such and not as creditors of Penn Central. Pennco, a wholly owned subsidiary of Penn Central, is a Delaware corporation with its principal place of business in Wilmington, Delaware. As disclosed by Penn Central's original Petition for the Restraining Order, Pennco is not a railroad corporation but is "engaged in business primarily as an investment company" (p.2). No petition for reorganization has been filed in any Court with respect to Pennco.

The Banks are unsecured loan creditors of Pennco, holding claims in the aggregate of \$50 million (Petition, p.2). The Banks are opposed to the application to extend the Restraining Order on the ground that, on the facts disclosed by Penn Central's original petition, the Court is without jurisdiction to restrain them from pursuing their rights as creditors of Pennco.

ARGUMENT

THE COURT IS WITHOUT JURISDICTION TO RESTRAIN THE BANKS FROM TAKING ACTION WITH RESPECT TO PENNCO

The principal contention advanced in Penn Central's Petition for the Restraining Order is that action which the Banks have taken or might take as creditors of Pennco

"....would usurp the function and judgment of the trustee or trustees to be appointed by the court on July 15, 1970, and such drastic change in the financial structure of the Pennsylvania Company should not be undertaken without the prior approval of this Court, if at all, and certainly not without prior study and recommendation on the part of the trustee or trustees." (Petition, p.4).

This contention is without merit because the assets of Pennco and the rights of its creditors cannot be encompassed in the pending reorganization of Penn Central. Neither the Court nor the trustees which it may appoint for Penn Central will have any statutory power in these reorganization proceedings with respect to the creditors of Pennco.

Similarly, neither Pennco nor its creditors can voluntarily or otherwise subject themselves or the assets of Pennco to the jurisdiction of this reorganization court. Accordingly, actions taken by Pennco or its creditors cannot and do not usurp any legitimate function of the Trustees or this court. The instant order, being wholly without any legal basis, cannot restrain the legitimate actions of Pennco in the conduct of its own affairs or the lawful exercise by the creditors of Pennco of their respective legal rights.

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In such an event, the order is not in conformity with the provisions of Rule 65(b) of the Federal Rules of Civil Procedure, it must be pointed out that Penn Central sought the exercise of some power conferred by an applicable provision of the Bankruptcy Act. There are only three provisions of the Act which might be thought to sustain the Court's jurisdiction to issue the Restraining Order in question here. Section 77(a) provides that the Court in which the petition of the debtor railroad corporation is filed shall have "exclusive jurisdiction of the debtor and its property wherever located". Section 77(j) provides that the Court "may enjoin or stay the commencement or continuation of suits against the debtor until after final decree, and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree". Finally, Section 2.a(15) provides that the Court may make such Orders "in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act".

The language of each of these provisions, however, has been held not to constitute authority for the issuance of an order restraining creditors of a subsidiary of the debtor. While the stock of Pennco is an asset of Penn Central, the

*Among other things, the order provides that it shall remain in effect for 17 days, whereas Rule 65(b) requires that a temporary restraining order granted without notice must expire by its terms within 10 days. Austin v. Altman, 332 F.2d 273 (2d Cir. 1964).

subsidary are not the property of the parent and a Court in which the parent is being reorganized has no jurisdiction to enjoin an action against a subsidiary of the debtor. 71a
See 6 Collier, Bankruptcy, 501 (14th ed. 1969). Thus, in In re Adolf Gobel, Inc., 80 F.2d 849 (2d Cir. 1936), the Second Circuit held that those provisions did not justify the issuance of an Order restraining an action against a subsidiary of a debtor undergoing bankruptcy reorganization under former Section 77 B (now Chapter X). With respect to the statutory grant of "exclusive jurisdiction of the debtor and its property wherever located", the Court held that the property of the subsidiary "was not only in no sense in the debtor's possession, but it was not the debtor's property", 80 F.2d at 852. With respect to the provision that the Court

"may enjoin or stay the commencement or continuation of suits against the debtor . . . [and] the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree",

the Court held that it afforded no authority for enjoining an action against a subsidiary. Such an action

"was not against this debtor nor was it a judicial proceeding to enforce any lien upon its estate. The assets of the [subsidiary] corporation were involved, not the [subsidiary's] stock, which was part of the debtor's estate. The appellant made no claim to the [subsidiary's] stock; there was no attempt to impress a lien upon it" Ibid.

Finally, the Court held that Section 2.a(15) of the Bankruptcy Act likewise does not authorize enjoining the creditor of a subsidiary from prosecuting an action at law "merely because its common stock is held by the debtor in reorganization proceedings...." Ibid.

The Second Circuit's decision in In re Adolf Gehel, Inc., has been cited with approval both by the United States Supreme Court (Callaway v. Benton, 336 U.S. 132, 147-48 (1949)) and the Third Circuit (In re South Jersey Land Corp., 361 F.2d 610, 614 (1966)). In South Jersey, the Third Circuit took notice of

"... the Supreme Court's admonition 'that Congress did not give the Bankruptcy Court exclusive jurisdiction over all controversies that in some way affect the debtor's estate'. Callaway v. Benton, 336 U.S. 132, 142

"Since the power to stay proceedings against the debtor or its property, 11 U.S.C. §§ 543, 546(f), 548, is necessarily limited by the jurisdiction of the reorganization court, it follows that a stay may not be issued where the mortgage foreclosure proceeding is brought against property which is not the debtor's. 6 Collier, Bankruptcy (14th ed.) § 3.32 at 753; 11 Remington, Bankruptcy § 4376 at 62. There is also precedent to support the proposition that a reorganization court may not stay a proceeding involving property owned by a corporation in which the debtor is a stockholder. In re Adolf Gehel, Inc., 80 F.2d 849 (C.A.2, 1936); In the Matter of Hopper Canyon Mining Co., 156 F. Supp. 535 (D. Del., 1957). (Footnotes omitted.) 361 F.2d at 613-14.

Nor are the circumstances here anything like those involved in In re Pittsburgh Railways, 155 F.2d 477, cert. denied sub nom., Philadelphia Co. v. Guggenheim, 329 U.S. 731 (1946), where the Third Circuit found it appropriate to disregard the separate corporate identities of 36 underlying street railways welded together by a single operating company so as to constitute "one operation and one enterprise".

155 F.2d at 462. Here, on the other hand, the papers filed by Penn Central establish that it and Pennco are both formally and factually distinct enterprises engaged in different activities. Penn Central, according to its original Petition, is "a common carrier by railroad"; Pennco, on the other hand, is "engaged in business primarily as an investment company", with investments totaling hundreds of millions of dollars in enterprises completely unrelated to railroad activities.

Finally, the language and history of Section 77 make it perfectly clear that the assets and creditors of Pennco are beyond the jurisdictional reach of these proceedings. Reorganization under Section 77 is available only to a "railroad corporation", defined in Section 77(m) to mean "any common carrier by railroad . . . in interstate commerce" Penn Central has not and could not assert that Pennco is a railroad corporation within that definition.

Section 77(a) expressly provides for the reorganization of railroad subsidiaries of debtor railroad corporations. The history of that provision makes it clear that non-railroad subsidiaries of railroad corporations were intentionally placed outside the reach of Section 77 proceedings. As originally enacted in 1933, Section 77(a) provides that "any corporation", a majority of the capital stock of

which was owned by any railroad corporation filing a petition under Section 77, could file a petition for reorganization in the same proceeding. Act of March 3, 1933, ch. 204, 47 Stat. 1414. That provision, however, was significantly narrowed by an amendment enacted by Congress in 1935 which changed the phrase "any corporation" to "any railroad corporation". H.R. Rep. No. 1283, 74th Cong., 1st Sess. 9 (1935); Act of August 27, 1935, ch. 774, 49 Stat. 911. As the Court observed in In re Pittsburgh, S. & W. R.R., 75 F. Supp. 292, 296 (W.D. Pa. 1947):

"As a result of the above amendment, it is clear that a subsidiary of a debtor railroad in reorganization must itself be a railroad corporation in order to fall within the jurisdiction of a Federal Court wherein a proceeding involving the reorganization of a debtor railroad has been filed. It follows therefore that a non-railroad corporation, the majority of whose stock is owned or controlled by a debtor railroad in reorganization, is not such a subsidiary of the parent railroad in reorganization as to qualify for reorganization in the same debtor proceeding in which the parent railroad is being reorganized".

The clear Congressional intent to exclude from Section 77 proceedings the non-railroad subsidiaries of railroad corporations conclusively established the lack of a jurisdictional basis for the present Restraining Order.

75a

CONCLUSION

For the foregoing reasons, the Restraining Order should not be extended.

Respectfully submitted,

John C. Hamilton, Jr.
JOHN C. HAMILTON, JR.
WILLIAM R. KLAUS
Pepper, Hamilton & Goletz
2001 The Fidelity Building
Philadelphia, Pennsylvania 19103

and

CRAVATH, SWAIN & MOORE
1 Chase Manhattan Plaza
New York, New York 10005

Attorneys for Chemical Bank
in its own right and as Agent
Bank, on behalf of the Banks

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OFFICE COPY ENTERED

-----x
ANITA B. BRODY,

: 71 Civ. 2639

Plaintiff, : AFFIDAVIT

-against-

CHEMICAL BANK, et al.,

: 3/15/72

Defendants. :
-----x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BENEDICT WOLF, being duly sworn, deposes and says:

1. I am a member of the firm of Wolf Popper Ross Wolf & Jones, Esqs., attorneys for the plaintiff in this stockholder's derivative and representative action. I am familiar with the proceedings, and the facts set forth hereinafter are based either upon court records or material in the public press.

2. The defendants have moved under Fed. R. Civ. P. 12(b) to dismiss the complaint, basing the motion on a number of grounds. At the argument of this motion before Honorable Milton Pollack, who had been assigned to the case, one of the questions discussed was whether the plaintiff had sufficiently complied with the requirements of Fed. R. Civ. P. 23.1 in her allegation setting forth her reasons for making no demand on the Board of Directors or stockholders of Pennsylvania Company ("Pennco") to initiate suit. Judge Pollack, after the argument on the motion, gave the parties time to submit additional papers. Pursuant to such permission, I am submitting this affidavit and an accompanying Memorandum.

3. The amended complaint alleges that in early 1970 Penn Central Transportation Company ("Railroad"), which completely controlled and dominated Pennco, was in a precarious financial condition; it revealed to the defendant banks its bad financial situation and its critical need for funds; it asked the banks for a loan but they refused to lend funds directly to Railroad; instead the banks conspired with and aided and abetted Railroad in causing Pennco to borrow \$50 million from the banks and to transfer the proceeds of the loan to Railroad in exchange for Railroad notes; the banks knew or had reason to know that this loan to Pennco was not for any valid business purposes of Pennco. that Railroad was compelling Pennco to borrow the money, that Railroad would be a recipient of the money, that Railroad's note to Pennco for this money was or would shortly become almost worthless and that Railroad could not repay the \$50 million loan to Pennco; the banks were willful conspirators with Railroad in this transaction; and that Pennco's forced participation in the loan was a sham and a fraud on Pennco and impaired its capital and credit solely for the benefit of Railroad and the banks and converted Pennco's assets for Railroad's use.

4. Since the defendants based their argument, at least in part, on alleged factual material although the question of adequacy of compliance with Rule 23.1 was raised under Fed. R. Civ. P. 12(b)(6) and therefore the factual submissions were not properly before the Court, I am constrained to present to the Court certain facts bearing on plaintiff's assertion that demand would have been futile, thus eliminating the need to make demand. I do this without waiving plaintiff's position that if factual material outside of the complaint is to be

considered, thus bringing the matter within the scope of Fed. R. Civ. P. 56, the plaintiff should have the right to pre-trial examinations before the motion is decided, under the principles established by the cases set forth in our accompanying memorandum.

5. I respectfully submit that the facts hereinafter set forth clearly show that on June 14, 1971, when this action was commenced, demand on the Board of Directors of Pennco and on the trustees of Railroad, the owner of all the common stock of Pennco, to bring this action would have been futile.

6. In June 1970 the plaintiff commenced an action in the Common Pleas Court of Philadelphia (the "Philadelphia action"), the first cause of action of which was brought derivatively on behalf of Pennco, against Penn Central Company, the parent of Railroad, and the then directors of Pennco, charging various wrongs against Pennco. One of the allegations dealt directly with the compelled borrowing by Pennco of \$50 million from various banks and the transfer of the money to Railroad and its subsidiaries, this being the same transaction which is the basis of the instant action. The instant case is brought against the banks as co-conspirators and aiders and abettors of Railroad in compelling Pennco to make the aforesaid loan and turn the proceeds over to Railroad and as beneficiaries with Railroad from the transaction.

7. In July 1970 the Federal District Court in Philadelphia, in a bankruptcy proceeding, appointed four trustees to take over Railroad's property, with authorization to continue its business operations. On September 24, 1970 Pennco announced the organization of a new Board of Directors of four persons, these being Samuel H. Hellenbrand, who was designated as Presi-

dent; Jonathon O'Herron, Bayard H. Roberts and John MacArthur. No indication was given as to the means by which or under what authority the new directors replaced the Board members who were defendants in plaintiff's Common Pleas Court action. Mr. Hellenbrand was and continued to be a Vice President of Railroad. Jonathon O'Herron was and continued to be Executive Vice President of Railroad, and Bayard H. Roberts was and continued to be Secretary of Railroad. Thus in September 1970 three of the four members of Pennco's Board were employees of Railroad.

8. In the Philadelphia action, testimony was taken at the instance of Pennco from W.W. Riley, Secretary of Pennco, on March 3, 1971. After testifying that Pennco's principal place of business was in Wilmington, Delaware, he stated that at the end of 1970 Hellenbrand was President and a Board member of Pennco and that the other Board members were MacArthur, George K. Whitney of the Massachusetts Finances Services and Alfred W. Martinelli, Assistant Vice President of Railroad. How Mr. Whitney and Mr. Martinelli became directors was not stated. Although, according to Mr. Riley, from April 1970 to March 3, 1971, no stockholders meetings of Pennco were held, by March 3, 1971 the Board had been expanded to include William C. Antoine, Assistant Vice President of Railroad, and Victor H. Palmieri, who replaced Mr. Hellenbrand as President of Pennco. Again there was no indication of how or by whose authority these latter changes were effected.

9. Mr. Palmieri, who became President and chief executive officer on February 3, 1971, was also an officer of Great Southwest Corporation, of which Pennco owned 82% of the

common stock. He is a principal of a real estate investment firm and urban system counseling firm located on the West Coast, and when he agreed to become Pennco's chief executive officer, it was under a contract pursuant to which his firm received \$300,000 a year, two-thirds of which is paid by Pennco and one-third by Great Southwest Corporation. Thus Mr. Palmieri has had a substantial financial stake in maintaining his directorships and offices in Pennco and Great Southwest.

10. Thus, according to Mr. Riley's testimony, on March 3rd, 1971, Pennco's Board consisted of two Assistant Vice Presidents of Railroad, a person whose firm was receiving \$300,000 from Railroad's subsidiary, Pennco, and Pennco's subsidiary, Great Southwest, and two others, whose connections with Railroad, if any, were not known to plaintiff. Palmieri was Pennco's chief executive officer, and Martinelli its Senior Vice President. Since the Trustees of Railroad were since July 1970 in control of Pennco through their ownership of all of Pennco's common stock, the plaintiff had the right to assume that the five directors who comprised Pennco's Board of Directors on March 3, 1971 were all designees of the Trustees and served at the Trustees' pleasure.

11. The composition of the Board of Directors of Pennco at that time is of great significance because on February 3, 1971 Pennco, in the Philadelphia action brought by the plaintiff, filed preliminary objections to the complaint seeking its dismissal on the ground, among others, that it stated no derivative cause of action, and set the hearing date on these objections for March 3, 1971.

12. There was no change in the makeup of the Board of Directors of Pennco by June 14, 1971, the date of the commencement of this action, as far as plaintiff knew. No public announcement of any change had been made. On May 25, 1971, Mr. Palmieri was still President and chief executive officer, drawing substantial remuneration, and Mr. Martinelli, Assistant Vice President, finance, of Railroad was Senior Vice President. The plaintiff was therefore fully justified in assuming that the Pennco Board of Directors, which had taken the position a few months earlier that the transactions complained of in this case, together with others covered by the Common Pleas Court action stated no cause of action, and that the complaint which was based on these transactions should be dismissed, would take the same position in June 1971. She was bolstered in this assumption by the fact that in June 1971 Pennco's preliminary objections were still pending and had not been withdrawn, despite the fact that the derivative cause of action in Philadelphia was brought for Pennco's benefit. In passing I note that the preliminary objections are still being pressed by Pennco, not only on the ground that no cause of action is stated but on additional grounds of a technical nature. Pennco has consistently made it clear that it was not taking a neutral position in the Philadelphia action but is opposing any attempt to show that the loan transaction and the other transactions complained of in that case had been improper acts, to Pennco's substantial harm.

13. Although the method by which the composition of the Board of Pennco was changed from time to time is shrouded in mystery, there is no mystery about the interest of Railroad's Trustees in connection with the challenged transaction. The

plaintiff is seeking to have the Pennco obligation of \$50 million to the defendant banks cancelled, thus increasing Railroad's obligations by that amount and compelling the banks to become creditors of Railroad rather than Pennco, a result the banks are understandably resisting since Railroad is in bankruptcy.

14. While defendants claim that "common sense establishes" that as far as the Trustees are concerned, it would be in Railroad's interest if this debt were declared illegal and thus Pennco's assets were increased by \$50 million, neither the facts nor common sense bear out this claim.

15. In the first place, the common stock of Pennco, all of which is owned by Railroad and therefore presently by the Trustees, is pledged by Railroad to a group of banks (including some of the defendants in this case) as collateral for a \$300 million loan. Thus Pennco's net worth would have to be increased by \$50 million more than the \$300 million owed by Railroad for Railroad to benefit, a doubtful result according to statements made by Pennco officials.

16. Early in 1971 the Trustees filed statements with the House Commerce Committee in which they said there was little likelihood that Railroad could realize any cash from the disposition of Pennco's assets. This assertion was based on the statement that Pennco was worth \$400 million but was burdened by a long term debt of \$148.7 million. Thus Railroad's equity in Pennco was substantially less than the \$300 million amount of the debt to the banks and even if Pennco's net worth were increased by \$50 million, nothing would be left for Railroad.

17. On May 25, 1971 at a press conference, Mr. Martinelli, Pennco's Senior Vice President, said that there was no way of assigning a net worth to Pennco as of that date.

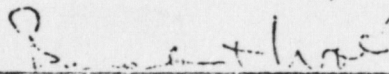
18. At the press conference above mentioned, the Trustees said that Railroad's needs were so vast that they were using every method they could to obtain the necessary equity financing. It is to be noted that the usual source of such financing is the banking community and plaintiff was justified in assuming that the Trustees would never permit their nominees on the Board of Directors of Pennco, two of whom (Messrs. Palmieri and Martinelli) were present at the press conference, to attack a transaction with the defendant banks, four of whom are substantial creditors of Railroad as participants to the extent of 20% of the \$300 million loan and therefore participants in the collateral consisting of Railroad's Pennco stock.

19. The Trustees faced the additional problem that as Railroad they would be directing a subsidiary to sue on the basis of a charge that Railroad had conspired with the defendant banks to perpetrate a wrong on Pennco. In such a situation, a serious question of equitable estoppel could arise, since one of the malefactors might be held to be trying to take advantage of its own wrongdoing.

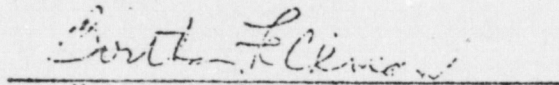
20. On the basis of all of the foregoing, and most decisively the fact that Pennco on February 3, 1971 took the position that the loan transaction did not give rise to a cause of action on behalf of Pennco and that Pennco maintained this position until June, 1971 and indeed up to the present, plaintiff was fully justified in not making demand on Pennco's Board of Directors or on Railroad to start this action. The allegations in her complaint, served on June 14, 1971, that Railroad controls Pennco and its directors, that to make demand upon the directors would be to request that they sue the company that has chosen them and controls them and that therefore any demand upon the

Board of Directors to redress or prevent the wrongs herein described would have been futile, and the further allegation that it would have been futile to make demand on Railroad, which owns all of Pennco's common stock, since Railroad was one of the persons alleged to be wrongdoers, comply with the requirements of Rule 23.1.

21. I respectfully submit that to the extent that defendants base their motion to dismiss on failure to comply with Rule 23.1, the motion should be denied. Other aspects of defendants' motion are discussed in plaintiff's Answering Memorandum, and in the Supplemental Memorandum submitted herewith.


BENEDICT WOLF

Sworn to before me this
15th day of March, 1972.


Notary Public

BERTHA FELDMAN
Notary Public, State of New York
No. 41-1134793
Qualified in Queens County
Commission Expires March 30, 1973

LAW OFFICES
WOLF POPPER ROSS, WOLF & JONES
845 THIRD AVENUE
NEW YORK, N. Y. 10022

PLATA 9-4600

CABLE "WOPOROW" NEW YORK

July 11, 1972

Honorable Lee P. Gagliardi
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

85a

Re: Brody v. Chemical

Dear Judge Gagliardi:

In response to your request, I am setting forth the matters upon which plaintiff would seek discovery in connection with her assertion that demand on the Board of Directors of Pennsylvania Company (Pennco) to bring the instant lawsuit would have been futile.

1. The circumstances under which the members of the Board of Directors of Pennco on June 14, 1971 (the date this action was commenced) were chosen.

It is plaintiff's contention that the Trustees of Penn Central Transportation Company (Railroad) did not install an entirely new Board of Directors of Pennco unrelated to its predecessors, as alleged in Pennco's Answer, but that in fact a Board of Directors consisting of the very persons involved in the wrongdoing which is the basis of this lawsuit, all of them officials of Railroad and designated by it to serve as directors of Pennco, chose their successor directors in September, 1970, after the Trustees of Railroad had been designated by Judge Fullam. Three of the four members thus chosen were officers of Railroad and representing its interests, which, in connection with the loan transaction here involved, were adverse to that of Pennco. The members of this Board, dominated by Railroad officials, chose their successors so that the Board, at the beginning of March, 1971 and on June 14, 1971, consisted of two Assistant Vice Presidents of Railroad, who represented Railroad's interests (Martinelli and Antoine), two persons whose possible ties with Railroad or its officials plaintiff is entitled to explore (MacArthur and Whitney) and a person (Palmieri) whose consulting firm had a substantial financial stake (\$300,000 a year) in his continued retention of his position with Pennco.

Honorable Lee P. Gagliardi
July 11, 1972
Page 2.

2. Discovery will show that the members of the Board of Directors of Pennco knew, prior to June 14, 1971, of the likelihood that the retention of Palmieri's position and fees and the position and emoluments of the other Board members would be controlled by a group of banks (the Banks) which included most of the defendant banks, since in May, 1971, the Trustees of Railroad had reached an agreement to turn over all of the common stock of Pennco to the Banks, who would thus become the sole common stockholders of Pennco.

3. Discovery will show that the Board of Directors of Pennco had taken affirmative actions which indicated to plaintiff that demand would be futile.

a) One of the actions with regard to which plaintiff would seek discovery involves a derivative and representative stockholder's action brought in the Common Pleas Court in Philadelphia by the plaintiff in the instant action as a Pennco stockholder. The action was brought against Penn Central Company, Railroad's parent, and the then directors of Pennco, and involved among other wrongful acts, the loan transaction which is the subject of the instant lawsuit.

Discovery will show that the Board of Directors of Pennco, instead of joining in the effort to set aside the loan transaction, or, at the very least, of taking a neutral position, decided actively to oppose plaintiff's effort to free Pennco from the \$50,000,000 debt burden. In furtherance of this decision, Pennco was caused in March, 1971 to file preliminary objections to the Common Pleas Court complaint in an effort to get it dismissed. Discovery will also show that the Board which in March, 1971 had taken a position against plaintiff's efforts to set aside the loan transaction was the same Board which existed in June, 1971 and that plaintiff's assumption that in June the Board would take the same position as in March was justified. In fact there has been no change in Pennco's position in the Common Pleas case to this very day.

b) The other action into which plaintiff would seek to inquire is the failure of Pennco's Board of Directors to take any affirmative action to challenge the loan transaction. Plaintiff would endeavor to prove that the Pennco Board has known of the transaction at least since the present members of the Board started to serve and that its claim, as set forth in Pennco's answer, that it is investigating this matter, has no substance, but is no more than an attempt to hide the fact that it never intended to act.

Honorable Lee P. Gagliardi
July 11, 1972
Page 3.

87a

4. The extent of the Trustees' involvement.

Through discovery plaintiff would seek to ascertain

a) whether the Trustees of Railroad played any active role in the choice of the Pennco Board of Directors or whether they delegated this choice to Railroad's management, a holdover management which was involved in the challenged loan transaction,

b) whether the Trustees participated in or were informed of the Pennco Board decision to seek to dismiss plaintiff's complaint in the Common Pleas Court,

c) whether the Trustees considered or took a position prior to June 14, 1971 with regard to the validity of Pennco's obligation to the defendants arising from the \$50,000,000 loan.

5. Railroad would not benefit from having the Pennco \$50,000,000 debt cancelled.

Through discovery plaintiff will show that despite defendants' contentions, it would not be Railroad's interest (and therefore the interests of the Trustees, as trustees for the benefit of Railroad's creditors and stockholders) to have the \$50,000,000 debt transferred from Pennco to Railroad. Plaintiff will show that the cancellation of the debt will not increase the value of Railroad's interest in Pennco by the \$50,000,000. Specifically, plaintiff will show

a) the Trustees informed a committee of Congress early in 1971 that there was little likelihood that they could realize any cash from the disposition of the Pennco assets, since Pennco was worth \$400,000,000, against which there was a long term debt of \$148,700,000 and the prior claim of the preferred stock, thus leaving a value to Pennco's common stock of much less than the \$300,000,000 debt which Railroad owed the Banks and for which the Pennco common stock was pledged as collateral. Even if Pennco's assets were increased by \$50,000,000 through the cancellation of the loan, there would still be nothing left for Railroad after it paid its \$300,000,000 collateralized debt to the Banks,

b) Martinelli, an officer of Pennco, said on May 25, 1971 that a quick realization of Pennco's assets could bring between \$50,000,000 and \$100,000,000 (far less than Railroad's \$300,000,000 debt to the Banks) and that there was no way of assigning a net worth to Pennco at that time,

Honorable Lee P. Gagliardi
July 11, 1972
Page 4.

88a

c) the Trustees had agreed prior to June 14, 1971 to turn over Railroad's Pennco stock to the Banks in exchange for cancellation of Railroad's \$300,000,000 debt (and a loan of \$150,000,000 to Railroad) and any increase in the net worth of Pennco by transfer of the \$50,000,000 loan obligation from Pennco to Railroad, a result which this lawsuit seeks to accomplish, would in no way benefit Railroad, which would no longer own the Pennco common stock,

d) Judge Fullam recognized the stake of the Banks in Pennco's assets, and the need to protect the Banks against the transfer of assets from Pennco to Railroad, when he directed that they be given notice of all Pennco actions just as though they were Pennco stockholders.

6. It was against the interests of the Trustees to challenge the validity of the \$50,000,000 Pennco obligation to the defendants since this would jeopardize their relations with the defendant banks and the banking community generally.

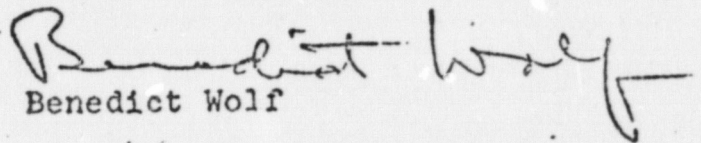
The plaintiff through discovery will show that the Trustees had stated that Railroad's needs were so vast that they were using every method available to them to obtain the necessary equipment of financing. The source of this financing is the banking community. For the Trustees to permit Pennco's Board of Directors to seek to free Pennco from a \$50,000,000 debt and relegate the defendants to their rights as creditors of a bankrupt railroad might well affect their ability to get financing from the defendants and other banks. Furthermore the Trustees were to receive a loan of \$150,000,000 from the Banks as part of the agreement to transfer the Pennco common stock to the Banks. Thus, there was a conflict of interest between the duty of the Trustees to Railroad and their duty as controlling stockholder of Pennco.

I respectfully submit that if through discovery the plaintiff is able to show what I have set forth above, she would have ample justification for not having made a demand on Pennco's Board of Directors to commence this action. While I am of the opinion that the allegations of the complaint should be accepted as true on this motion to dismiss, if Your Honor should treat this aspect of the motion as one for summary judgment, I urge that she is entitled to discovery on the matters which I have listed, to show that issues of fact exist which would compel the denial of a motion for summary judgment.

Honorable Lee P. Gagliardi
July 11, 1972
Page 5.

Plaintiff is of the opinion that the conclusory allegations of the complaint dealing with Rule 23 compliance are sufficient for pleading purposes. If, however, it should be deemed necessary to plead additional evidentiary material such as that set forth above, plaintiff should be given an opportunity to amend her complaint for this purpose.

Respectfully yours,


Benedict Wolf

BW/em

Copies to All Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

ANITA B. BRODY,

Plaintiff,

-against-

CHEMICAL BANK, MANUFACTURERS HANOVER
TRUST COMPANY, IRVING TRUST COMPANY,
CHASE MANHATTAN BANK, N.A., BANK OF
MONTREAL, GIRARD TRUST BANK, THE
FIDELITY BANK, MELLON NATIONAL BANK
& TRUST COMPANY, PITTSBURGH NATIONAL
BANK, NATIONAL BOULEVARD BANK OF
CHICAGO and PENNSYLVANIA COMPANY,

Defendants.

----- X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

PAUL M. OSTERGARD, being duly sworn, deposes and
says:

1. I am corporate secretary and counsel to Penn-
sylvania Company ("Pennco"). Pennco has been requested by counsel
for certain of the defendant banks to set forth certain facts for
the Court with respect to the composition of the Board of Direc-
tors of Pennco on June 14, 1971, the date that this action was
commenced. I make this affidavit in response to such request.

2. The Board of Directors of Pennco on June 14,
1971 consisted of the following persons:

91a

Alfred W. Martinelli, Senior Vice President and Administrative Officer, Pennsylvania Company;

John H. McArthur, Associate Dean and Professor, Harvard Graduate School of Business Administration;

Victor H. Palmieri, President and Chief Executive Officer, Pennsylvania Company and Great Southwest Corporation, a principal subsidiary; and

George K. Whitney, Retired Managing Trustee, Massachusetts Investment Trust, Consultant to Massachusetts Financial Services, Inc., Honorary Chairman of the Board, Transportation Association of America.

Mr. McArthur became a Pennco director on September 23, 1970; Messrs. Palmieri and Whitney became Pennco directors on October 22, 1970; Mr. Martinelli became a Pennco director on November 19, 1970.

3. Prior to September 1970, Mr. Martinelli for a period of time had been an assistant vice-president-accounting of the Railroad. With that sole exception, none of the above persons who were directors of Pennco on June 14, 1971 had been officers, directors or employees of the Railroad or Pennco prior to the June 1970 filing by the Railroad of its petition for reorganization. None of these directors is at the present time or was at the time this action was commenced an officer, director or employee of the Railroad.

4. In addition, on March 17, 1972, four additional persons were added to the Pennco Board of Directors and the Board as presently constituted consists of the four persons named above plus these four additional directors. The four additional directors are:

92a

Anthony M. Frank, President of Citizens
Savings & Loan Association, San Francisco,
California;

John F. Magee, President of Arthur D.
Little, Inc.;

Robert T. Sprouse, Professor of Accounting,
Graduate School of Business Administration,
Stanford University;

Robert G. Wiese, Managing Partner, Scudder,
Stevens & Clark.

To the best of my belief, none of these four additional directors
has at any time been an officer, director or employee of the
Railroad.

Paul M. Ostergard
Paul M. Ostergard

Sworn to before me this

13th day of July, 1972

Alice J. Asher

Notary Public

Alice J. Asher

Notary Public State of New York
No. 41-1117595 Queens County
Comm. Expires March 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ANITA B. BRODY,

Plaintiff,

-against-

CHEMICAL BANK, MANUFACTURERS HANOVER
TRUST COMPANY, IRVING TRUST COMPANY,
CHASE MANHATTAN BANK, N.A., BANK OF
MONTREAL, GIRARD TRUST BANK, THE
FIDELITY BANK, MELLON NATIONAL BANK &
TRUST COMPANY, PITTSBURGH NATIONAL BANK,
NATIONAL BOULEVARD BANK OF CHICAGO AND
PENNSYLVANIA COMPANY,

Defendants.
-----X

: 71 Civ. 2639 - LPG

: VERIFIED SECOND AMENDED
: COMPLAINT

: PLAINTIFF DEMANDS A
: TRIAL BY JURY

Plaintiff, by her attorneys, WOLF POPPER ROSS WOLF
& JONES, for her complaint, alleges on information and belief
except as to paragraphs "1," "2," "3," "6" and "31" which plain-
tiff alleges upon knowledge:

FIRST COUNT

1. Plaintiff is the owner and holder of shares of
the cumulative preferred stock of the defendant Pennsylvania
Company ("Pennco"). Plaintiff has been a stockholder of Pennco
since May 14, 1968 and was a stockholder of Pennco at the time
of the acts and transactions complained of herein.

2. Plaintiff brings this cause of action deriva-
tively on behalf of, and for the benefit of, Pennco.

3. This action is not a collusive one to confer
on this Court jurisdiction it would otherwise not have.

4. This count is brought to enforce rights arising under Section 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. Section 77q(a) and the common law. This Court has jurisdiction of this count under Section 22(a) of the Securities Act, 15 U.S.C. Section 77v(a) and under the principle of pendent jurisdiction.

5. This count arises from sales of securities and acts and transactions which occurred in the Southern District of New York.

6. Plaintiff is a citizen of the State of Pennsylvania.

7. Pennco was, at all times hereinafter mentioned, and still is: (a) a corporation organized under the laws of the State of Delaware, with its principal place of business in Delaware; and (b) present and doing business in the City, County and State of New York with offices for the transaction of business in the Borough of Manhattan. At all such times, Pennco transacted, and still transacts, business in the City, County and State of New York. Pennco's Board of Directors has met in the City, County and State of New York and Pennco maintains at least one bank account in the City, County and State of New York.

8. Pennco operates as an investment company. Its principal investments include holdings in railroad companies, controlling interests in real estate development companies, and all of the common stock of a pipeline company. At the end of 1969, 95.3% of its assets consisted of stocks and bonds and other evidences of indebtedness.

9. The defendants Chemical Bank, Manufacturers Hanover Trust Company, Irving Trust Company, Chase Manhattan Bank, N.A., Bank of Montreal, Girard Trust Bank and The Fidelity Bank (the "Defendant Banks") and Mellon National Bank & Trust Company, Pittsburgh National Bank, and National Boulevard Bank of Chicago

are all banking institutions which, at all times hereinafter mentioned, and at the present time, had and have citizenship and residence as follows:

(a) Chemical Bank ("Chemical"), Manufacturers Hanover Trust Company ("Manufacturers") and Irving Trust Company ("Irving") are organized under the laws of the State of New York and are present and doing business in the City and County of New York with offices for the transaction of business in the Borough of Manhattan.

(b) Chase Manhattan Bank, N.A. ("Chase") is organized under the laws of the United States and maintains its principal place of business in the City, County and State of New York.

(c) Bank of Montreal ("Montreal") is organized under the laws of the Country of Canada and is present and doing business in the City, County and State of New York with offices for the transaction of business in the Borough of Manhattan.

(d) Mellon National Bank and Trust Company ("Mellon") and Pittsburgh National Bank ("PNB") are organized under the laws of the United States and are present and doing business in the City, County and State of New York with offices for the transaction of business in the Borough of Manhattan.

(e) National Boulevard Bank of Chicago ("Boulevard") is organized under the laws of the United States with principal offices in Chicago, Illinois.

(f) Girard Trust Bank ("Girard") and The Fidelity Bank ("Fidelity") are organized under the laws of the State of Pennsylvania with prin-

cipal offices in Philadelphia, Pennsylvania.

10. Penn Central Transportation Company ("Railroad") was at all times hereinafter mentioned, and still is:

(a) a corporation organized under the laws of the Commonwealth of Pennsylvania; and (b) present and doing business in the City, County and State of New York with offices for the transaction of business located in the Borough of Manhattan.

11. A. At all times hereinafter mentioned, and at the present time, Montreal, Mellon, PNB, Boulevard, Girard and Fidelity transacted and still transact business in the City, County and State of New York.

B. At all times hereinafter mentioned, and at the present time, said defendants derived and presently derive substantial revenue from interstate commerce.

C. The causes of action set forth herein arise (a) out of the business transacted by said defendants in the City, County and State of New York; (b) out of tortious acts committed by said defendants in the City, County and State of New York; and (c) out of tortious acts committed by said defendants without the State of New York causing injury to persons and property within the State, which injury said defendants expected or should reasonably have expected.

12. Pennco's capital stock consists of 5,600,000 shares of common stock, of which 4,985,000 shares are issued and outstanding, and 730,000 shares of 4-5/8% cumulative preferred stock, \$100 par value, of which 705,786 shares are outstanding. The preferred stock can exercise voting rights if dividends are defaulted for six quarterly periods, in which event the preferred stockholders can elect two directors. Dividends on the

preferred stock are paid from the Defendant Chemical in the City, County and State of New York.

13. All of Pennco's common stock is owned by Railroad. Its cumulative preferred stock is publicly owned.

14. Railroad, through such stock ownership, at all times hereinafter mentioned, has controlled and continues to control Pennco and Railroad has selected and designated the directors and officers of Pennco.

15. In the foregoing manner, Railroad was able to and did completely control and dominate the management of the affairs and business of Pennco, and Pennco's business decisions and policies were determined by Railroad.

16. Railroad was in a precarious financial condition for more than a year and a half prior of the time it filed for reorganization. It had a loss of more than \$56 million in 1969, and a loss of \$62.7 million in the first quarter of 1970. On a consolidated basis, the loss for the first quarter of 1970 was \$79.6 million. It had a serious problem of liquidity which compelled it, on June 21, 1970, to file a petition under Section 77 of the Federal Bankruptcy Act. The Defendant Banks have been aware, since its organization, of Railroad's precarious position.

17. At least one of the Defendant Banks, Defendant Chase, on behalf of its customers, was heavily invested in the common stock of Penn Central Company ("Penn Central"), the parent of Railroad. Thus, it was in the interest of the Defendant Chase to keep the true financial picture of Railroad from becoming publicly known for a long enough period to enable it to liquidate its holdings in Penn Central. Defendant Chase, acting upon the confidential information referred to in paragraph 19 hereof, did in fact liquidate many of its hold-

ings prior to the filing by Railroad of the aforesaid petition under the Bankruptcy Act.

18. At all times hereinafter mentioned and continuing to the present time, Railroad has managed and operated Pennco, and has used its assets and credit, for the benefit of Railroad and to the detriment of Pennco, causing Pennco to enter into the transactions hereinafter described for Railroad's benefit in disregard of the interests of Pennco. The Defendant Banks conspired with, and aided and abetted Railroad, in said transactions, as follows:

19. Sometime in or about early 1970, Railroad disclosed its dire financial situation to the Defendant Banks, showing them confidential projections of its dismal financial future, and informing the Defendant Banks of its critical need for funds. Such information disclosed to the Defendant Banks was not yet available to the public. Railroad requested a loan from the Defendant Banks and from Mellon, PNB and Boulevard, but they refused to lend funds directly to Railroad.

20. Accordingly, the Defendant Banks and Railroad conspired together to, and did, cause Pennco, in May or June, 1970, to borrow \$50 million from the Defendant Banks and from Mellon, PNB and Boulevard in return for the note or notes of Pennco and transfer the proceeds of said loan to Railroad in exchange for the note or notes of Railroad. This loan was not intended to and did not serve any proper business or corporate purpose of Pennco. This loan was negotiated in the City, County and State of New York and was closed in the offices of Defendant Chemical in the City, County and State of New York.

21. The forced participation of Pennco in said loan was a sham and a fraud upon Pennco. Pennco received no genuine

consideration for said participation, receiving only the note or notes of Railroad, which note or notes the Defendant Banks knew or had reason to know was, or would shortly become, almost worthless. Said forced participation of Pennco impaired its capital and credit solely for the benefit of Railroad and the Defendant Banks and converted the assets of Pennco to Railroad's use.

22. The Defendant Banks were wilfull conspirators with Railroad in the aforesaid loan transaction. The Defendant Banks knew or had reason to know that:

- (a) Their loan of \$50 million to Pennco was not for any valid business or corporate purpose of Pennco and Pennco had no valid reason to borrow said sum;
- (b) At the time of said loan transaction, Railroad controlled Pennco and Pennco's directors were also directors of Railroad;
- (c) Railroad was compelling Pennco to borrow said \$50 million and Railroad was the intended recipient of the loan;
- (d) Railroad's note, received by Pennco, was not fair or adequate consideration for the funds turned over by Pennco to Railroad. Railroad's note was, or would shortly become, almost worthless and Railroad was incapable of repaying the loan to Pennco.

23. By reason of the foregoing, the Defendant Banks violated Section 17(a) of the Securities Act in that, in the

sales of securities by the use of the mails and other instruments of transportation or communication in interstate commerce, they employed devices, schemes and artifices to defraud; they obtained money or property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and they engaged in transactions, practices or courses of business which operated as a fraud or deceit upon Pennco.

24. By reason of the foregoing, the Defendant Banks conspired to, and did, defraud Pennco, to the substantial benefit and unjust enrichment of the Defendant Banks, causing great harm and substantial damage to Pennco in the amount of at least \$50 million.

25. The exact amount of the benefit to, and unjust enrichment of, the Defendant Banks, and the exact amount of damages to Pennco are unknown to plaintiff and can only be ascertained upon an accounting.

26. Plaintiff has made no demand on the Board of Directors of Pennco to take action with regard to the wrongs herein described for the following reasons:

(a) The Pennco Board of Directors, at the date of the commencement of this action, consisted of Victor H. Palmieri, John H. McArthur, George K. Whitney and Alfred W. Martinelli. Said persons were designated directors of Pennco either by Railroad, the controlling stockholder of Pennco and one of the wrongdoing parties to the transactions herein complained of (or by the Trustees in Bankruptcy appointed to manage the affairs of Railroad and preserve Railroad's assets), by persons who were and remained executive officers of Railroad,

101a

or by Pennco directors who had themselves been made such directors by Railroad.

(b) On July 2, 1970 (at or about the same time that the Trustees in Bankruptcy were appointed to manage Railroad's affairs and conserve its assets), plaintiff commenced an action in the Common Pleas Court of Philadelphia (the "Philadelphia Action"), the first cause of action of which was brought derivatively on behalf of Pennco against Penn Central Company, the parent of Railroad, and the then directors of Pennco, charging various wrongs committed against Pennco. One of the wrongs complained of was the fraudulent funnelling of \$50,000,000 by various banks through Pennco to Railroad, this being the same transaction which is the basis of the instant action. The Board of Directors of Pennco, as of the date of the commencement of this action, instead of joining in the effort to set aside the loan transaction, or, at the very least, taking a neutral position, decided actively to oppose plaintiff's effort to free Pennco from the \$50,000,000 debt burden. In furtherance of this decision, the Board of Directors caused Pennco, in February, 1971, to file preliminary objections to the Philadelphia Action in an effort to have it dismissed. The directors of Pennco are maintaining their adverse position to plaintiff's claims, and are still attempting to dismiss the Philadelphia Action.

(c) Pennco's Board of Directors has failed to take any affirmative action to challenge the loan

transaction despite the fact that the Pennco Board has known of the transaction at least since the members of the Board started to serve (September-November, 1970).

(d) The members of the Pennco Board who were such members at the date of the commencement of this action had a substantial financial interest in retaining their positions with Pennco. Directors McArthur and Whitney were receiving salaries in excess of \$25,000 a year just for serving as directors. Director Martinelli, who until his designation as director, had been an employee of Railroad, was receiving a salary substantially in excess of \$25,000 as an officer and director of Pennco. Director Palmieri, who was also President of Pennco was and continues to be a principal owner of a real estate investment and urban system counseling firm. His employment by Pennco was under a contract pursuant to which his firm received \$300,000 a year, two-thirds paid by Pennco and one-third by its subsidiary, Great Southwest Corporation.

(e) All of Pennco's common stock is pledged to secure a \$300,000,000 loan made to Railroad by a group of financial institutions, including most of the Defendant Banks. At the date of the commencement of this action, negotiations were in progress between Railroad and said financial institutions, in which negotiations said Palmieri actively participated, whereby Railroad would turn over to the financial institutions all of its Pennco common stock in exchange for the cancellation of the \$300,000,000 loan and certain other benefits. The completion of this transaction would have resulted

in the Defendant Banks becoming substantial stockholders of Pennco, and thus in a position to exercise a decisive voice in the continued retention of the Pennco directors in their positions and their continued receipt of the financial benefits they were getting from Pennco.

(f) The Trustees of Railroad were actively seeking the help of the financial institutions, including the Defendant Banks, for financing to continue the operations of Railroad and were not in a position to take actions such as challenging the validity of the transaction herein complained of, which would antagonize the Defendant Banks or the financial community from which they were seeking aid to carry out their function of managing Railroad's affairs and preserving its assets.

(g) The possibility of the Defendant Banks becoming substantial stockholders of Pennco continues, since the \$300,000,000 loan mentioned above is in default and the Pennco stock which is collateral for that loan is subject to foreclosure.

In sum, the Pennco directors, as of the time of the commencement of this action, were and still are dominated by Railroad; the directors had long and full knowledge of the wrongs alleged and had failed to seek redress; the directors were and still are attempting to secure a dismissal of an action by plaintiff in an action in Philadelphia which action, brought against the parent of Railroad and the former directors of Pennco, seeks to void the transaction complained of; and the

directors have a substantial personal interest in not antagonizing Defendant Banks or Railroad. Thus, any demand upon the Pennco Board to redress the wrongs complained of would have been futile.

27. Demand upon the stockholders of Pennco to bring this action need not be made.

28. Plaintiff has no adequate remedy at law.

SECOND COUNT AGAINST DEFENDANTS
CHEMICAL, MANUFACTURERS, IRVING,
CHASE AND MONTREAL

29. This count is brought to enforce rights arising under the common law. This Court has jurisdiction of this count under the principle of diversity of citizenship.

30. The defendants named in this count are citizens of states other than Pennsylvania.

31. The amount in controversy exceeds the sum of \$10,000, exclusive of interest and costs.

32. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "3," "5" through "8," "9(a), (b) and (c)," "10," "11" in so far as it applies to the aforesaid defendants, "12" through "22" and "24" through "28" hereof with the same force and effect as if set forth in full herein.

WHEREFORE, plaintiff demands judgment against Defendants Chemical, Manufacturers, Irving, Chase, Montreal, Girard and Fidelity on the First Count, and against Defendants Chemical, Manufacturers, Irving, Chase and Montreal on the Second Count:

A. In favor of Pennco for the amount of all profits and benefits gained by said defendants and Railroad and all damages sustained by Pennco by virtue of the acts and transactions set forth above, plus exemplary damages.

B. Rescinding the transaction by which defendants acquired Pennco's notes, declaring such notes void, and requiring their delivery to Pennco and their cancellation, upon delivery by Pennco to the Defendant Banks of the notes given by Railroad to Pennco in connection with the \$50 million transaction complained of herein.

C. For the plaintiff, for the costs and disbursements of this action, including reasonable counsel fees and accounting fees.

D. For such other and further relief as the Court may deem just and proper.

WOLF POPPER ROSS WOLF & JONES

By: R. [Signature]
A Member of the Firm

Attorneys for Plaintiff
845 Third Avenue
New York, New York 10022
(212) PL 9-4600

STATE OF NEW YORK)
) .SS:
 COUNTY OF NEW YORK)

BENEDICT WOLF, being duly sworn, deposes and says:

That he is a member of the firm of Wolf Popper Ross Wolf & Jones, attorneys for the plaintiff in the within action; that he has read the foregoing Second Amended Complaint and knows the contents thereof; that the same is true to his own knowledge except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

This verification is made by deponent because the plaintiff resides in Bala Cynwyd, Pennsylvania, which is outside of the Southern District of New York and a considerable distance from the office of plaintiff's attorneys, which is located in the County, City, and State of New York.

Benedict Wolf
 BENEDICT WOLF

Sworn to before me this
 9th day of January, 1974.

Lester L. Levy
 Notary Public
 LESTER L. LEVY
 Notary Public, State of New York
 No. 03-7427400
 Qualified in Bronx County
 Certificate issued in New York County
 Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

107a

ANITA B. BRODY,

Plaintiff,

-against-

CHEMICAL BANK, MANUFACTURERS HANOVER TRUST COMPANY, IRVING TRUST COMPANY, CHASE MANHATTAN BANK, N.A., BANK OF MONTREAL, GIRARD TRUST BANK, THE FIDELITY BANK AND PENNSYLVANIA COMPANY,

Defendants.

ORAL ARGUMENT
REQUESTED

71 Civ. 2639 - LPG

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the second amended complaint filed herein, the undersigned will move this Court (Hon. Lee P. Gagliardi) at Room 1105, United States Court House, Foley Square, New York, New York, at 4:00 p.m. on February 26, 1974, for judgment pursuant to Fed. R. Civ. P. 12(B) (6) dismissing this action, the second amended complaint and each of the causes of action asserted therein, with prejudice as to this plaintiff, upon the ground that plaintiff has failed to comply with Fed. R. Civ. P. 23.1 and for such other and further relief as may be just and proper.

February 8, 1974.

CRAVATH, SWAIN & MOORE,

by

A member of the firm.

Attorneys for Defendants
Chemical Bank and
The Fidelity Bank,
One Chase Manhattan Plaza,
New York, N. Y. 10005

108a

SIMPSON THACHER & BARTLETT,

by

James J. O'Hagan
A member of the firm

Attorneys for Defendant
Manufacturers Hanover Trust
Company,

One Battery Park Plaza,
New York, N. Y. 10004

WINTHROP, STIMSON, PUTNAM &
ROBERTS,

by

Stephen A. Werner
A member of the firm

Attorneys for Defendant
Irving Trust Company,
40 Wall Street,
New York, N. Y. 10005

MILBANK, TWEED, HADLEY & McCLOY,

by

[Signature]
A member of the firm

Attorneys for Defendants
Chase Manhattan Bank, N.A.,
and Girard Trust Bank,
One Chase Manhattan Plaza,
New York, N. Y. 10005

BRADY & TARPEY, P.C.,

by

[Signature]
A member of the firm

Attorneys for Defendant
Bank of Montreal,
48 William Street,
New York, N. Y. 10038

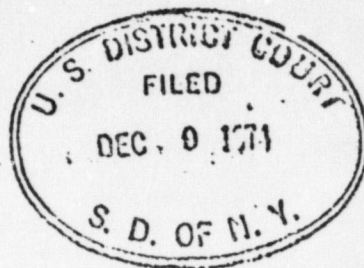
TO:

MESSRS. WOLF POPPER ROSS WOLF & JONES,
Attorneys for Plaintiff,
845 Third Avenue,
New York, N. Y. 10022

MESSRS. WACHTELL, LIPTON, ROSEN & KATZ,
Attorneys for Defendant
Pennsylvania Company
299 Park Avenue,
New York, N. Y. 10017

COPY

109a



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ANITA D. DEODY,

Plaintiff,

-against-

CHEMICAL BANK, MANUFACTURERS HANOVER
TRUST COMPANY, IRVING TRUST COMPANY,
CHASE MANHATTAN BANK, N.A., BANK OF
MONTREAL, GIRARD TRUST BANK, THE
FIDELITY BANK AND PENNSYLVANIA
COMPANY,

Defendants.
-----x

71 Civ. 2639

MEMORANDUM
DECISION

41539

GAGLIARDI, D. J.

On remand from the Court of Appeals, defendants move to dismiss the second amended complaint upon the ground that it fails to comply with the requirements of Rule 23.1, Fed. R. Civ. P.

Plaintiff commenced this action on June 14, 1971 both derivatively, on behalf of the Pennsylvania Company ("Pennco"), and representatively, on behalf of herself and all similarly situated shareholders of Pennco, to invalidate a \$50,000,000 loan by Pennco to Penn Central Transportation Company ("Railroad") and loans in a like amount by defendant banks to Pennco. The defendant banks moved to dismiss the derivative counts of the complaint, as amended on July 30,

1971, for failure to comply with the pleading requirements of Rule 23.1¹ and to dismiss the representative counts of the amended complaint for failure to state a claim and on other grounds.

On July 26, 1972, this court granted defendants' motion to dismiss the complaint. The derivative claims were dismissed on the ground that the conclusory allegations in the amended complaint were insufficient to excuse plaintiff's failure to make a demand upon Pennco's directors, and that allegations contained in affidavits and other papers filed by plaintiff failed to establish that a demand upon Pennco's sole common shareholder, Railroad's reorganization trustees, would be futile. The representative claims were dismissed on the ground that the purported claims properly belonged to Pennco and not its shareholders.

On July 3, 1973, the Court of Appeals affirmed the dismissal of the representative counts. Procter & Chemical Bank, 482 F.2d 1111 (2d Cir. 1973) (per curiam). As to the derivative counts the Court of Appeals concluded that "In view of the gravity of the alleged wrongdoing we cannot agree

¹Rule 23.1 provides in pertinent part:
The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

111a

with the final dismissal and therefore remand." Id. at 1114.
In so doing, the Court affirmed the determination of this court that the allegations of the amended complaint did not excuse plaintiff's failure to make a demand on Pennco's board under Rule 23.1:

Inasmuch as four trustees have been appointed for the bankrupt Railroad and since they in turn have selected a new board of four directors for Pennco, we cannot disagree with the court below that the allegations of the complaint are insufficient to excuse plaintiff's failure to make a demand on the Pennco board.

Id. The Court went on to note, as did this court (Proby v. Chemical Bank Docket No. 71 Civ. 2639, at 8 (S.D.N.Y. July 26, 1972)), that plaintiff had requested additional discovery to establish that there was an interrelationship between the new Pennco board and the pre-bankruptcy management of the Railroad. The issues raised by this request were not reached inasmuch as this court found that plaintiff had failed to establish that a required demand on the shareholders would be futile. On the basis of an argument raised by plaintiff for the first time on appeal, the Court of Appeals held that under the law of Delaware no demand on the shareholders was required. The Court remanded the case, stating:

The plaintiff then may either make a demand on the directors or not, as she so chooses. In any event, the replying must comply with Rule 23.1.

Supra, 482 F.2d at 1114.

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112a

Plaintiff again chose not to make a demand on Pennco's directors and served a second amended complaint on January 9, 1974. In paragraph 26 of this complaint, plaintiff sets forth facts supporting the allegation that a demand on the directors of Pennco at the time the action was originally commenced would have been futile.

The demand requirement of Rule 23.1 recognizes the equitable principle that the shareholder's derivative suit is an extraordinary action that may only be maintained where it is clear that the board of directors, which is the real party in interest and has the primary responsibility for taking action in the name of the corporation, has wrongfully declined to act. See 7A Wright & Miller, Federal Practice and Procedure, §1831 at 374 (1972). Thus, the courts have long required that the plaintiff in a derivative action "show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes." Hawes v. Oakland, 104 U.S. 450, 460-61 (1881). See In re Kauffman Mutual Fund, 479 F.2d 257, 263 (1st Cir. 1973).

The allegations contained in paragraph 26 of the second amended complaint purport to establish that a demand on the Pennco board, as constituted at the time of the commencement of the action, would have been futile. In view

113a

of the fact that the Court of Appeals, in remanding, expressly afforded the plaintiff another opportunity to make a demand, the allegations of paragraph 26 are misplaced. The facts pleaded by plaintiff to excuse demand should have related to and supported an allegation of futility of making a demand on the board of directors of Pennco as constituted on the date of the filing of the second amended complaint, January 9, 1974.²

Because plaintiff's amended allegations relate to the Pennco board as constituted at the time of the commencement of the action, they are clearly insufficient to satisfy the requirements of Rule 23.1 in this case. The defendants' motion to dismiss the second amended complaint is therefore granted. However, plaintiff is given 20 days within which to either make a demand on the directors or replead.

So Ordered.

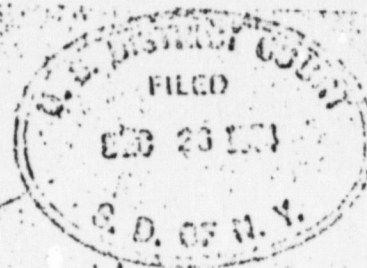
Lee P. Capliando
U.S.D.S.

Dated: New York, New York
December 5, 1974.

²At the time of the commencement of the action, June 24, 1971, the Pennco Board consisted of four directors. It appears that on March 17, 1972 four additional directors were added to the board. The present composition of the board is not known to the court.

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1148
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



ANITA B. BRODY,

Plaintiff,

71 Civ. 2639 - LFG

-against-

CHEMICAL BANK, MANUFACTURERS HANOVER
TRUST COMPANY, IRVING TRUST COMPANY,
CHASE MANHATTAN BANK, N.A., BANK OF
MONTREAL, GIRARD TRUST BANK, THE
FIDELITY BANK and PENNSYLVANIA
COMPANY,

ORDER

Defendants.

-----X
Sufficient cause appearing, it is

ORDERED, that the time of plaintiff to make a demand
on the directors of Pennsylvania Company or replead is extended
until and including January 9, 1975.

Dated: New York, N.Y.
December 23, 1974

[Signature]
U.S.D.J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ANITA B. BRODY,

Plaintiff,

-against-

CHEMICAL BANK, MANUFACTURERS HANOVER
TRUST COMPANY, IRVING TRUST COMPANY,
CHASE MANHATTAN BANK, N.A., BANK OF
MONTREAL, GIRARD TRUST BANK, THE
FIDELITY BANK and PENNSYLVANIA
COMPANY,

Defendants.
-----x

:
:
: 71 Civ. 2639 LPG

:
:
: NOTICE OF APPEAL
:
:
:

Notice is hereby given that Anita B. Brody, plain-
tiff above named, hereby appeals to the United States Court
of Appeals for the Second Circuit from the order entered in
this action on the 9th day of December, 1974, dismissing the
second amended complaint.

Dated: New York, New York
January 3, 1975

WOLF POPPER ROSS WOLF & JONES

By *Barbara Wolf*
A Member of the Firm
Attorneys for Plaintiff
845 Third Avenue
New York, New York 10022
PL 9-4600

TO: Clerk,
United States District Court
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Cravath, Swaine & Moore, Esqs.
Attorneys for Defendants
Chemical Bank and The Fidelity Bank
One Chase Manhattan Plaza
New York, New York 10005

Winthrop, Stimson, Putnam & Roberts, Esqs.
Attorneys for Defendant
Irving Trust Company
40 Wall Street
New York, New York 10005

Milbank, Tweed, Hadley & McCloy, Esq.
Attorneys for Defendants
Chase Manhattan Bank, N.A. and Girard Trust Bank
One Chase Manhattan Plaza
New York, New York 10005

Brady & Tarpey, P.C.
Attorneys for Defendant
Bank of Montreal
84 William Street
New York, New York 10038

Simpson Thacher & Bartlett, Esqs.
Attorneys for Defendant
Manufacturers Hanover Trust Company
One Battery Park Plaza
New York, New York 10004

Wachtell, Lipton, Rosen & Katz, Esqs.
Attorneys for Defendant
Pennsylvania Company
299 Park Avenue
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANITA B. BRODY,

Plaintiff,

-against-

CHEMICAL BANK, MANUFACTURERS HANOVER
TRUST COMPANY, IRVING TRUST COMPANY,
CHASE MANHATTAN BANK, N.A., BANK OF
MONTREAL, GIRARD TRUST BANK, THE
FIDELITY BANK AND PENNSYLVANIA
COMPANY,

Defendants.

71 Civ. 2639 - LPG

NOTICE

PLEASE TAKE NOTICE that the annexed order and judgment will be submitted for signature and entry to the Honorable Lee P. Gagliardi, United States District Judge, at the Clerk's Office, United States Court House, Foley Square, New York, N. Y. at 10:00 a.m., on February 6, 1975.

Dated: February 4, 1975.

CRAVATH, SWAINE & MOORE,
Attorneys for Defendants
Chemical Bank and The Fidelity Bank,
One Chase Manhattan Plaza,
New York, N. Y. 10005

SIMPSON THACHER & BARTLETT,
Attorneys for Defendant
Manufacturers Hanover Trust Company,
One Battery Park Plaza,
New York, N. Y. 10004

118a

WINTHROP, STIMSON, PUTNAM & ROBERTS,
Attorneys for Defendant
Irving Trust Company,
40 Wall Street,
New York, N. Y. 10005

MILBANK, TWEED, HADLEY & McCLOY,
Attorneys for Defendants
Chase Manhattan Bank, N.A., and
Girard Trust Bank,
One Chase Manhattan Plaza,
New York, N. Y. 10005

BRADY, TARPEY, DOWNEY, HOEY, P.C.,
Attorneys for Defendant
Bank of Montreal,
84 William Street,
New York, N. Y. 10038

TO:

MESSRS. WOLF POPPER ROSS WOLF & JONES,
Attorneys for Plaintiff,
845 Third Avenue,
New York, N. Y. 10022

MESSRS. WACHTELL, LIPTON, ROSEN & KATZ,
Attorneys for Defendant
Pennsylvania Company,
299 Park Avenue,
New York, N. Y. 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

119a

ANITA B. BRODY,

Plaintiff,

-against-

CHEMICAL BANK, MANUFACTURERS
HANOVER TRUST COMPANY, IRVING
TRUST COMPANY, CHASE MANHATTAN
BANK, N.A., BANK OF MONTREAL,
GIRARD TRUST BANK, THE FIDELITY
BANK AND PENNSYLVANIA COMPANY,

Defendants.

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71 Civ. 2639 - LPG

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ORDER AND JUDGMENT

Defendants Chemical Bank, Manufacturers Hanover
Trust Company, Irving Trust Company, Chase Manhattan Bank,
N.A., Bank of Montreal, Girard Trust Bank and The Fidelity
Bank, having moved to dismiss this action and the second
amended complaint with prejudice, and an order having been
entered on December 9, 1974, granting said motion, giving
plaintiff 20 days within which to either make a demand on
the directors of the Pennsylvania Company or replead, and
the Court having extended such time to January 9, 1975, and
plaintiff having failed to either make a demand on the
directors of the Pennsylvania Company or replead, it is

120a

ORDERED AND ADJUDGED that this action is dismissed
with prejudice.

Dated: New York, N.Y.
February , 1975

United States District Judge

Judgment entered
February , 1975

Clerk

AFFIDAVIT
OF ROBERT M. SONDAK

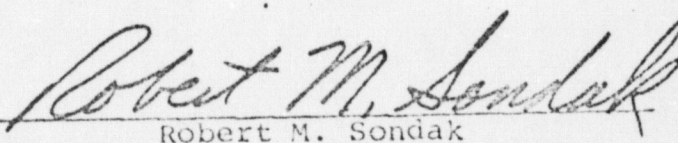
2. Plaintiff filed a second amended complaint herein on January 9, 1974. Defendants Chemical Bank, Manufacturers

122a

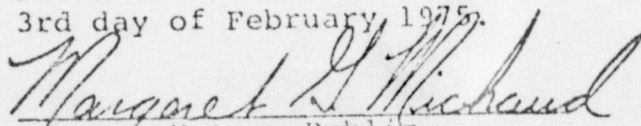
Hanover Trust Company, Irving Trust Company, Chase Manhattan Bank, N.A., Bank of Montreal, Girard Trust Bank and The Fidelity Bank moved to dismiss that pleading. In an opinion and order filed December 9, 1974, Judge Gagliardi dismissed the second amended complaint, giving plaintiff 20 days within which to either make a demand on the directors of the Pennsylvania Company or replead. Judge Gagliardi later extended plaintiff's time to do so until and including January 9, 1975.

3. Plaintiff has to date failed to replead. On January 29, 1975, at oral argument in the companion state action, Brody v. Irving Trust Co., et al. (Index No. 7615/72, Supreme Court of the State of New York, County of New York) before the Appellate Division, First Judicial Department, plaintiff's counsel in both actions in an answer to a question by the Court, represented that plaintiff has not made a demand on the directors of the Pennsylvania Company.

4. It is therefore respectfully requested that defendants Chemical Bank, Manufacturers Hanover Trust Company, Irving Trust Company, Chase Manhattan Bank, N.A., Bank of Montreal, Girard Trust Bank and The Fidelity Bank have judgment in the form submitted herewith dismissing the action with prejudice.


Robert M. Sondak

Sworn to before me this
3rd day of February, 1975.


MARGARET J. MICHAEL, Public
Notary Public, State of New York
No. 30-2669530
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires March 30, 1975

123a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

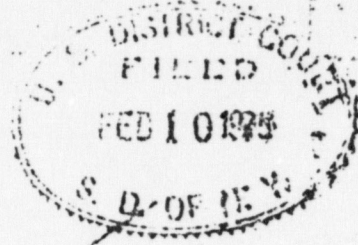
ANITA B. BRODY,

Plaintiff,

-against-

CHEMICAL BANK, MANUFACTURERS
HANOVER TRUST COMPANY, IRVING
TRUST COMPANY, CHASE MANHATTAN
BANK, N.A., BANK OF MONTREAL,
GIRARD TRUST BANK, THE FIDELITY
BANK AND PENNSYLVANIA COMPANY,

Defendants.



71 Civ. 2639 - LPG

ORDER AND JUDGMENT

Defendants Chemical Bank, Manufacturers Hanover Trust Company, Irving Trust Company, Chase Manhattan Bank, N.A., Bank of Montreal, Girard Trust Bank and The Fidelity Bank, having moved to dismiss this action and the second amended complaint with prejudice, and an order having been entered on December 9, 1974, granting said motion, giving plaintiff 20 days within which to either make a demand on the directors of the Pennsylvania Company or replead, and the Court having extended such time to January 9, 1975, and plaintiff having failed to either make a demand on the directors of the Pennsylvania Company or replead, it is

(15)

ORDERED AND ADJUDGED that this action is dismissed
with prejudice.

Dated: New York, N.Y.
February 11, 1975

L. J. [Signature]
United States District Judge

Judgment entered
February 11th, 1975

Raymond F. Berglund
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

125a

-----x
ANITA B. BRODY,

Plaintiff,

:
:
71 Civ. 2639 LPG

-against-

CHEMICAL BANK, MANUFACTURERS HANOVER
TRUST COMPANY, IRVING TRUST COMPANY,
CHASE MANHATTAN BANK, N.A., BANK OF
MONTREAL, GIRARD TRUST BANK, THE
FIDELITY BANK and PENNSYLVANIA COMPANY,

Defendants.
:
-----x

NOTICE OF APPEAL

Notice is hereby given that Anita B. Brody, plaintiff
above named, hereby appeals to the United States Court of
Appeals for the Second Circuit from each and every part of the
order and judgment entered in this action on February 10, 1975,
dismissing the second amended complaint.

Dated: New York, New York
February 28, 1975

WOLF POPPER ROSS WOLF & JONES

By: Benedict Wolf

A Member of the Firm
Attorneys for Plaintiff
845 Third Avenue
New York, New York 10022
759-4600

TO:

Clerk
United States District Court
Southern District of New York
United States Court House
Foley Square
New York, New York

126a

Cravath, Swaine & Moore
Attorneys for Defendants
Chemical Bank and The Fidelity Bank
One Chase Manhattan Plaza
New York, New York 10005

Simpson Thacher & Bartlett
Attorneys for Defendant
Manufacturers Hanover Trust Company
One Battery Park Plaza
New York, New York 10004

Winthrop, Stimson, Putnam & Roberts
Attorneys for Defendant
Irving Trust Company
40 Wall Street
New York, New York 10005

Milbank, Tweed, Hadley & McCloy
Attorneys for Defendants
Chase Manhattan Bank, N.A. and Girard Trust Bank
One Chase Manhattan Plaza
New York, New York 10005

Brady, Tarpey, Downey, Hoey, P.C.
Attorneys for Defendant
Bank of Montreal
84 William Street
New York, New York 10038

COPY TO: Wachtell, Lipton, Rosen & Katz
Attorneys for Defendant
Pennsylvania Company
299 Park Avenue
New York, New York 10017



Service of 1 copies of this within

Appendix is admitted this

21st day of March 1975

1975 MAR 21 PM 12:35

Res
11:40 am

Simpson Thacher + Bartlett
ATTORNEYS FOR

Defendant-Respondent
Manufacturers Hanover Trust company

Copy received by Cravall Swain & Moore
3/24/75 by Robert Sondak

Attorneys for Defendants-Respondents Chemical Bank and The Fidelity Bank

Copy Received by Milbank Tweed Hadley & McCloy 3-21-75
by Gifford

Attorneys for Defendants-Respondents Chase Manhattan Bank, N.A.
and Girard Trust Bank

Copy received by Wentthrop Stinson Putnam & Roberts

Attorneys for Defendant-Respondent Irving Trust company

Copy received by Brady, Torrey, Darney, Hoy, P.C.

Attorneys for Defendant-Respondent Bank of Montreal

Copy received by Wadell, Light, Krueger & Hart

Attorneys for Defendant Pennsylvania Company